Supreme Court, U.S.
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No. 061255

IN THE

Supreme Court of the United States

ESTATE OF ARTHUR M. BARRETT BY ELAINE BARRETT, ADMINISTRATRIX OF THE ESTATE OF ARTHUR M. BARRETT,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: March 12, 2007

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QUESTIONS PRESENTED

I. Whether, in affirming the district court's orders of dismissals, all of which were based on the district court's Memorandum and Order, Pet. App. 1a-13a; 337 F. Supp. 2d 370 (D. Mass. 2004), entered September 28, 2004, with respect to the barring of the Petitioner's claim under the Federal Tort Claims Act, for failure to present her administrative claim to the appropriate federal agency within two years of the accrual of that claim, the Court of Appeals, Pet. App. 14a-39a, assumed the authority to narrow the waiver of sovereign immunity that Congress intended in the Federal Tort Claims Act, contrary to the teachings of this Court in *United States v. Kubrick*, 444 U.S. 111, 118; 100 S.Ct. 352; 62 ~~L.Ed.2d~~ 259 (1979); *Bowen v. New York*, 476 U.S. 467, 479, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986), as well as the holdings of other circuits, including the First Circuit itself in *McIntyre v. United States*, 367 F. 3d 38 (1st Cir. 2004).

II. Whether, in affirming the district court's orders of dismissals, all of which were based on the district court's same Memorandum and Order described in Question 1, as it related to the barring of Petitioner's Constitutional and State claims under the applicable statutes of limitations, the Court of Appeals approved an adjudicatory process that misapplied or ignored applicable law and violated Petitioner's rights under the First, Fourth and Fifth Amendments.

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed in the caption, eight former or current F.B.I. Agents and three organized crime figures were named as defendants in the Complaint filed in the district court on April 2, 2003. The F.B.I. Agents were H. Paul Rico (now deceased); John M. Morris; John J. Connolly, Jr.; Roderick Kennedy; Robert R. Fitzpatrick; James Ring; James Ahern and James Greenleaf. The organized crime figures were James Bulger, Stephen J. Flemmi and Kevin Weeks. Bulger has been a fugitive from justice for more than ten years. He was never served and did not participate or defend in either the district court or the Court of Appeals. Flemmi and Weeks also never participated or defended in either the district court or the Court of Appeals and were ultimately defaulted in the district court. Agents Rico (deceased), Morris and Connolly did not participate or defend in the Court of Appeals, although Agents Kennedy, Fitzpatrick, Ring, Ahern and Greenleaf did.

RULE 29.6 STATEMENT

Not applicable

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Estate of Arthur M. Barrett by Elaine Barrett, Administratrix of the Estate of Arthur M. Barrett, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The First Circuit's judgment and opinion (Pet. App. 14a-39a) is published at 462 F.3d 28 (No. 05-1905, First Cir. September 7, 2006). The opinion (Memorandum and Order) of the district court (Pet. App. 1a-13a) is published at 337 F.Supp.2d 370 (No. Civ. A. 03-10601-RCL, D. Mass. September 29, 2004).

JURISDICTION

The Court of Appeals denied a timely petition for panel rehearing on December 12, 2006 (Pet. App. 40a-47a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1)).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Constitution of the United States

First Amendment

"Congress shall make no law...abridging...the right of the people peaceably to assemble and to petition the Government for a redress of grievances."

Fourth Amendment

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing place to be searched, and person or things to be seized."

Fifth Amendment

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation."

STATUTORY PROVISIONS

28 U.S.C. § 2674

"The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages...."

28 U.S.C. § 2401(b)

"A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented."

28 U.S.C. § 1254 (1)

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."

STATEMENT OF THE CASE

Background

The complaint in this case was filed in the United States District Court for the District of Massachusetts (Boston) on April 2, 2003. The complaint was filed pursuant to (a) the Federal Tort Claims Act, 28 U.S.C. § 2671 *et seq.*, (b) Massachusetts Death Statute, which is M.G.L. c. 229, and (c) *Bivens v. Six Unknown Agents of the Federal Bureau of Narcotics*, 403 U.S. 388; 91 S. Ct. 1999; 29 L.Ed. 619 (1971), against the United States, eight former or current agents of the Boston Office of the F.B.I. and James Bulger, Stephen Flemmi and Kevin Weeks, seeking redress for the kidnapping, torture and murder of Arthur M. Barrett. From the date of the filing of the complaint to the present time, the words "accrue", "accrued" and "accrual" have been the focal point of Petitioner's case and have come to have greater social significance than "murder." After all murder generally has no statute of limitations, unless it is done or caused by an F.B.I. agent. Then the victim's loved ones are victimized again by fictions as to what they knew or should have known and when they knew it or should have known it. The net result is a dismissal of all of her FTCA, Constitutional and State claims. It is little wonder that the Court of Appeals said (Pet. App. 17a):

> "This case is the latest in a series of tragic cases arising out of the FBI's mishandling of informants drawn from organized crime...."
>
> "While we recognize the tragedy experienced by Barrett and his loved ones, the technical requirements of the FTCA and related laws are clear, they

serve important purposes, and we are bound to follow them.

REASONS FOR GRANTING THE WRIT

A Rule of Reason

The Courts must take care not to expand the waiver of sovereign immunity beyond what Congress intended, but it is equally important that the waiver of sovereign immunity not be narrowed or restricted to less than what Congress intended to confer, *United States v. Kubrick*, 444 U.S. 111; 118, 100 S. Ct. 352; 62 L.Ed.2d 259 (1979); *Bowen v. New York*, 476 U.S. 467, 479, 106 S.Ct. 2022, 90 L.Ed.2d 462 (1986); *McIntyre v. United States*, 367 F.3d 38 (1st Cir. 2004). The narrowing of the waiver was inherent in the entire process in this case.

This case is also remarkable for the flawed logic that caused Petitioner to lose everything. The district court's Memorandum and Order of September 28, 2004 held that the accrual date of all of Petitioner's claims was March 8, 2000, based on a single press report among thousands (Pet. App 5a-10a). The report was an article in the Boston Globe on March 9, 2000 by Globe crime reporter, Shelley Murphy. The quoted remarks Murphy attributed to Petitioner were distorted by the district court's unwarranted editorial conclusions. Also, Petitioner made no reference to Bulger and Flemmi according to the article itself, nor did she refer to the F.B.I., the Department of Justice, the U.S. Attorney's office, the State Police, or otherwise give any indication of whether she was referring to the State or Federal Government (Pet. App. 5a-10a).

The Articulated But Unapplied Standard

The district court stated that "in considering the United States' motion to dismiss for lack of subject matter jurisdiction, I accept the plaintiff's version of jurisdictionally significant facts as true. The district court did not adhere to this standard, even though the Government treated the plaintiff's factual allegations as true (Pet. App. 4a). The district court also held that in considering the motions to dismiss under Fed. R. Civ. P. 12(b)(6), he must accept the plaintiff's well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff (Pet. App. 4a). The district court did not adhere to this standard, even though the individual federal defendants followed the United States and treated the plaintiff's factual allegations as true. The Court of Appeals upheld the district court.

The Heart of the Matter

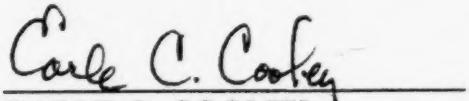
The issue that lies at the heart of this matter is: Can the Department of Justice and the F.B.I. stonewall the Courts, Congress and Claimants by withholding and concealing relevant, even crucial, evidence and then be rewarded with a dismissal of the FTCA claim for having done so. The answer should be that it cannot profit from its own obstruction of justice. What reasonable inquiry could the Petitioner and her counsel have conducted? The answer is none. The United States stonewalled Judge Wolf in the Salemme case, 91 F.Supp.2d 141, and key information was not made available to Judge Lindsay in deciding dismissal motions in the McIntyre and Wheeler cases (Civ. A. No. 01-10408 RCL and Civ. A. No. 02-10464) on March 31, 2003. It would have been a fool's errand for Petitioner and her counsel to seek witness statements or cooperation from the DOJ, the

F.B.I. or any of the individual defendants. Moreover, Bulger was and is a fugitive from justice, a status that was purportedly caused by the F.B.I. No statute of limitations should run while that status exists and it should not be overlooked that Bulger's being at large [posed a threat to Petitioner and her family. This very argument was made in Plaintiff's Memorandum of Opposition to the motions to dismiss of the United States, Morris and Fitzpatrick (Pet. App. 98a), yet the Court of Appeals refused to consider equitable tolling on the erroneous basis that it was being raised for the first time on appeal (Pet. App. 37a).

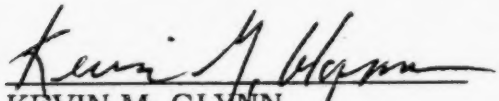
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For the foregoing reasons, the Court should grant a writ of certiorari in this case.

Respectfully submitted,



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Dated: March 12, 2007

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

The ESTATE OF ARTHUR M. BARRETT by ELAINE BARRETT, in her capacity as Administratrix of the Estate of Arthur M. Barrett,	)	CIVIL ACTION NO. 03-10601-RCL
Plaintiff,	)	
v.	)	
THE UNITED STATES OF AMERICA, et al.,	)	
Defendants.	)	

LINDSAY, District Judge

MEMORANDUM AND ORDER ON MOTIONS OF THE UNITED STATES, FITZPATRICK, AND MORRIS TO DISMISS BASED ON THE STATUTE OF LIMITATIONS

I. INTRODUCTION

This is an action brought by Elaine Barrett (the "plaintiff") as the administratrix of the Estate of Arthur M. Barrett (the "Estate") against the United States of America, Robert Fitzpatrick and John Morris, (the "agents," both of whom were FBI agents at the times relevant to the complaint), and others. The case arises out of the circumstances surrounding the murder of Arthur M. Barrett ("Barrett"), who was killed sometime after he disappeared on or about July 26, 1983. The

plaintiff has alleged that crime lords James J. Bulger and Stephen J. Flemmi and their associates murdered Barrett. The plaintiff also alleges that, at the time of Barrett's murder, Bulger and Flemmi were "top echelon" informants for the Federal Bureau of Investigation (the "FBI") and leaders of the Boston area's Winter Hill Gang, an association of individuals engaged in criminal activities. The complaint alleges that the United States, Fitzpatrick, Morris, and others allegedly permitted Flemmi and Bulger to commit criminal activities with impunity, including the murder of Barrett.

The complaint is in twelve counts.[1] In counts I through IV, the plaintiff asserts wrongful death claims by the Estate against the United States, Fitzpatrick, and Morris. Count VI contains an additional claim against the United States for wrongful death. The claims against the United States purport to have been brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2401, 2671, *et seq.* The United States has moved to dismiss all of the claims against it for lack of subject matter jurisdiction, claiming that the plaintiff failed to present her administrative claim to the appropriate federal agency within two years of the accrual of that claim, as required by the FTCA, 28 U.S.C. § 2401(b). The plaintiff presented her administrative complaint on behalf of the Estate on January 14, 2003.

In counts IX, X, XII, and XIII, the plaintiff also maintains that the conduct of Fitzpatrick and Morris is actionable under the rule stated in *Bivens v.* Six *Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), because the conduct violated Barrett's rights under the Fourth and Fifth amendments to the Constitution of the United States

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[1] The complaint does not contain a claim captioned as "Count V" but does contain two counts captioned as "Count XIII." Because the second "Count XIII" is a request for attorneys' fees, I consider it a request for relief rather than a cause of action.

and the Estate's right to access to courts guaranteed by the First and Fifth amendments. The plaintiff's *Bivens* and wrongful death claims against Fitzpatrick and Morris are subject to three-year statutes of limitations.[2] The plaintiff filed her lawsuit on April 2, 2003. Fitzpatrick and Morris moved to dismiss the claims against them as time-barred (docket entries 24 and 12).[3] In their respective motions, Fitzpatrick and Morris adopt the argument of the United States has made in support of its motion to dismiss.

For the reasons stated below, I hold that the plaintiff presented her administrative claim more than two years after its accrual, and therefore I GRANT the motion to dismiss of the United States. I also hold that the plaintiff filed this lawsuit more than three years after her state law and *Bivens* claims against Fitzpatrick and Morris accrued, and therefore I GRANT their motions to dismiss.

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[2] Because Congress has not established a time limitation for *Bivens* actions, the three-year Massachusetts statute of limitations applicable in tort actions for personal injuries, Mass. Gen. Laws ch. 260, § 2A, or civil rights actions, Mass. Gen. Laws ch. 260, § 5B, and any associated state tolling laws will apply, provided they are not inconsistent with federal law or policy. *Wilson v. Garcia*, 471 U.S. 261, 266-67, 276-80 (1985). Because both statutes have a three-year period of limitations, it is unnecessary to decide whether Mass. Gen. Laws ch. 260, § 5B supplants Mass. Gen. Laws ch. 260, § 2A for purposes of federal civil rights actions. *Street v. Vose*, 936 F.2d 38, 39 n.2 (1st Cir. 1991).

Under Massachusetts law, an action for wrongful death "shall be commenced within three years from the date of death, or within three years from the date when the deceased's executor or administrator knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action." M.G.L. ch. 229 § 2.

[3] Morris and Fitzpatrick captioned their motions as motions to dismiss for lack of subject matter jurisdiction. Because subject matter jurisdiction is not at issue with respect to the plaintiff's common law or *Bivens* claims against Morris and Fitzpatrick, I will treat their motions as having been brought pursuant to F.R.C.P. 12(b)(6).

II. FACTUAL BACKGROUND

In considering the United States' motion to dismiss for lack of subject matter jurisdiction, I "accept[] the plaintiff's version of jurisdictionally-significant facts as true" and "assess whether the plaintiff has propounded an adequate basis for subject matter jurisdiction." *Valentín v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001).[4] In considering the motions to dismiss of Fitzpatrick and Morris, I must "accept the plaintiff's well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff." *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 224 (1st Cir. 2004). I nonetheless "reject claims that are made in the complaint if they are 'bald assertions' or 'unsupportable conclusions.'" *Id.* In analyzing the motions, I may consider certain extrinsic materials without engaging in jurisdictional factfinding or converting the motion to dismiss into one for summary judgment. *See Valentín*, 254 F.3d at 363; *Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 37 (1st Cir. 2000); *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993) (explaining that "documents the authenticity of which are not disputed by the parties," official public records," "documents central to [the] plaintiffs' claim," or "documents sufficiently referred to

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[4] The First Circuit's shorthand for the method of considering a motion to dismiss for lack of subject matter jurisdiction without challenging the truthfulness *vel non* of plaintiff's allegations is the "sufficiency challenge." *Valentín*, 254 F.3d at 363. I could also determine whether the plaintiff's allegations supporting subject matter jurisdiction can withstand a "factual challenge." *Id.* Under this approach, "the plaintiff's jurisdictional averments are entitled to no presumptive weight," and "the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties." *Id.* In this case, however, I do not need to engage in differential factfinding because the government has treated the plaintiff's factual allegations as true.

in the complaint" may be considered in ruling on a motion under Fed. R. Civ. P. 12(b)(6)).

For purposes of this memorandum, I will assume the reader's familiarity with the numerous allegations contained in the plaintiff's lengthy complaint. Most of the plaintiff's allegations were drawn from the findings of fact in *United States v. Salemme*, 91 F. Supp. 2d 141 (D. Mass. 1999) (Wolf, J.), *rev'd in part on other grounds by United States v. Flemmi*, 225 F.3d 78 (1st Cir. 2000). *See* Compl. ¶ 6 ("This complaint closely tracks the findings and rulings of the United States District Court for the District of Massachusetts [contained in *Salemme*].") The complaint also appears to have been created by a manual cutting and pasting of the complaint in *McIntyre v. United States, et al*, Civil Action No. 01-10408-RCL. In determining whether the plaintiff's FTCA claims accrued more than two years before she presented her administrative claim, I have considered the numerous media reports the government submitted in conjunction with this motion, focusing in particular on an article published on March 9, 2000, in which the plaintiff was quoted as having said, in reference to Barrett's death that, "the government is responsible." U.S. Mem. Supp. Mot. Dismiss Ex. 1 (Shelley Murphy, *Burglar Caught in Violent Web Victim Made Last Desperate Calls for Money*, BOSTON GLOBE, Mar. 9, 2000, at B1 (the "Murphy article"), *available at* 2000 WL 3317093).[5] The plaintiff has not contested the authenticity of these documents or the attribution of the preceding statement to her. I have relied on the same documents in analyzing whether the plaintiff's *Bivens* and wrongful death claims against Fitzpatrick

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[5] Shelly Murphy authored other articles concerning Barrett. *See, e.g.*, U.S. Mem. Supp. Mot. Dismiss Ex. 5. In this memorandum, however, the term "Murphy article" or the shortened citation "Murphy, *supra*" will refer to this March 9, 2000 article.

and Morris accrued more than three years before she filed this lawsuit.

According to the plaintiffs, Barrett disappeared on July 26, 1983 and was subsequently tortured and murdered by Bulger, Flemmi, and others. "For more than 16 years after Barrett's disappearance ... his family was ignored by the FBI, except for a brief early visit following his disappearance, when the FBI claimed that Barrett was alive and a fugitive." Compl. ¶ 5. "On September 15, 1999, [the *Salemme* decision] disclosed, for the first time, information bearing on the complicity of the FBI in enabling and covering up the murders of Barrett and others." Compl. ¶ 5. "Four months following the issuance of *[Salemme]*, Barrett's bones were uncovered ....." Compl. ¶ 5. On March 9, 2000, the Murphy article reported that Barrett's remains had been identified the previous day. Murphy, *supra*.[6] The article also reported that Kevin Weeks, a former associate of Bulger, cooperating with the police, had led the police to Barrett's remains and had implicated Bulger and Flemmi in the murder of Barrett. *Id.* After explaining that Bulger and Flemmi had been FBI informants, the Murphy article quoted the plaintiff as stating, "I think the government is responsible because if they put [Bulger and Flemmi] away when they should have, [Barrett] would be alive today.... They gave them a license to kill and do whatever they wanted." *Id.* Murphy also reported that the plaintiff "said she feels some closure in knowing what happened to her husband." *Id.* The same article also quoted Kevin Glynn and identified him as an attorney representing the Barrett family. *Id.* Glynn

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[6] The plaintiff has alleged that "post-mortem determinations *and procedures* sufficient to identify *and permit release of Barrett's remains for cremation* were not completed until April, 2000." Compl. ¶ 5 (emphasis added). Because this allegation refers to the timing of both the identification *and release* of Barrett's remains, it does not contradict the statement in the Murphy article that Barrett's remains were identified on March 8, 2000.

later signed the Estate's administrative claim as well as the complaint in this lawsuit.

III. DISCUSSION

A. Motion of the United States

"The general rule, within the meaning of the FTCA, is that a tort claim accrues at the time of the plaintiff's injury." *Skwira v. United States*, 344 F.3d 64, 73 (1st Cir. 2003) (quoting *Atallah v. United States*, 955 F.2d 776, 779 (1st Cir. 1992)), *cert. denied*, 124 S. Ct. 2836 (2004). Under the so-called discovery rule, however, "the test [of accrual] is whether plaintiff knows, or in the exercise of reasonable diligence should have known, the factual basis of the cause of action, including the fact of the injury and the injury's causal connection to the government." *Cascone v. United States*, 370 F.3d 95, 104 (1st Cir. 2004). The standard of accrual under the discovery rule is an objective one, *Cascone*, 370 F.3d at 104, and the "reasonable diligence component" of the rule prevents a plaintiff from preserving her claim by "bury[ing] her head in the sand," *Skwira*, 344 F.3d at 77 (quoting *Diaz v. United States*, 165 F.3d 1337, 1339 (11th Cir. 1999)). Moreover, the "knowledge" necessary to trigger accrual need not be conclusive or absolute; rather, it consists of "the discovery of sufficient facts about the injury and its cause to prompt a reasonable person to inquire and seek advice preliminary to deciding if there is a basis for filing an administrative claim against the government." *Id.*

Under the FTCA, once a plaintiff's claim against the United States accrues, she has two years to present her administrative claim to the relevant agency of the United States. 28 U.S.C. § 2401(b). A plaintiff presents an administrative claim by completing a two-page form, and "the burden of preparing this form is minimal." *Skwira*, 344 F.3d at

70. Contrary to an argument advanced by the plaintiff, the certification requirements of Fed. R. Civ. P. 11(b) apply only to practice in the federal district courts and are irrelevant to the presentment of an administrative claim. *See* Fed. R. Civ. P. 1, 11; *Gaultier v. United States*, 837 F. Supp. 360, 365-66 (D. Kan. 1993).

In this case, the plaintiff unquestionably had notice of the factual basis of her claim more than two years before she presented that claim on January 14, 2003. For purposes of this motion, the plaintiff's case is indistinguishable from a related case included in the consolidated appeal *McIntyre v. United States*, 367 F.3d 38 (1st Cir. 2004). In *McIntyre*, the theory of liability of the Wheeler plaintiffs was essentially identical to the one advanced by the plaintiff -- that the United States was liable for the death of Roger Wheeler because the FBI allowed Bulger and Flemmi to commit crimes with impunity, including the murder of Wheeler. In proceedings leading to the appeal before the First Circuit, I granted a motion by the United States to dismiss the Wheeler complaint for lack of subject matter jurisdiction, based on the statute of limitations. The First Circuit affirmed the dismissal. In so doing, the court explained that the knowledge required to trigger accrual of the FTCA claims of the Wheeler plaintiffs consisted of

> facts available that would permit a reasonable person to conclude (1) that Bulger and Flemmi were instrumental in the murder of Roger Wheeler; (2) that Bulger and Flemmi were informants for the FBI; and (3) that the FBI had a special relationship with Bulger and Flemmi that protected and encouraged them in their criminal activity, including Wheeler's murder.

Id. at 58. Pointing to the substantial news coverage of the relationship between the FBI and Bulger and Flemmi, including information found in reports quoting a representative of Roger Wheeler's estate concerning that relationship, the First Circuit concluded that the Wheeler plaintiffs had or should have discovered all three of the triggering facts more than two years prior to filing of the administrative claim. *Id.* at 58-61.

Like the Wheeler plaintiffs, the plaintiff in this case knew more than two years prior to the filing of her administrative claim that "Bulger and Flemmi were instrumental in the murder of [Barrett]," that "Bulger and Flemmi were informants for the FBI," and that "the FBI protected and encouraged [Bulger and Flemmi] in their criminal activity, including [Barrett]'s murder." *Id.* at 58. The plaintiff alleges that the 1999 *Salemme* decision "disclosed, for the first time, information bearing on the complicity of the FBI in enabling and covering up the murders of Barrett and others," Compl. ¶ 5, but she has not alleged any delay in learning of the contents of the opinion. Moreover, on March 9, 2000, the Murphy article quoted the plaintiff as stating that the government was responsible for Barrett's murder, because the FBI had given Bulger and Flemmi a "license to kill." Murphy, *supra*. The plaintiff has not challenged the attribution of that statement to her. Thus, by that statement, the plaintiff has admitted that, not later than March 8, 2000, she had actual knowledge of the involvement of Bulger and Flemmi in Barrett's murder, the fact that Bulger and Flemmi were FBI informants at the time of Barrett's murder, and the fact that the FBI encouraged and protected Bulger and Flemmi in the murder of Barrett.[7] In short, her statement indicates

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[7] Because March 8, 2000 is more than two years prior to the date the plaintiff presented her administrative claim and more than three years before the date she filed her lawsuit, I do not need to decide the earliest date at which her claims could have

that by March 8, 2000, she knew that the government was responsible for the murder of her husband. The plaintiff's claims accrued no later than that date. Because the plaintiff did not comply with the two-year presentment requirement of the FTCA, I am without jurisdiction over her claims and GRANT the motion of the United States.

B. Motions of Fitzpatrick and Morris

The test of accrual of the *Bivens* and wrongful death claims against Fitzpatrick and Morris is essentially the same as the test of accrual of the plaintiff's claims under the FTCA. *See Marrapese v. Rhode Island*, 749 F.2d 934, 938 n.8 (1st Cir. 1984); M.G.L. ch. 229 § 2. The plaintiff has not argued that there is any difference between the factual basis of her claims under the FTCA and the factual bases of her *Bivens* and wrongful death claims; nor do I find such a distinction. Thus, for the reasons stated above, I find that the plaintiff's *Bivens* and wrongful death claims accrued not later than March 8, 2000 - - more than three years prior to the April 2, 2003 filing of this lawsuit.

The plaintiff argues that the certification requirements of Rule 11(b) either delayed accrual of her claim or served as an obstacle to the filing of her lawsuit within the three-year period of limitations following the accrual of her claim. This proposition is wholly without merit. Indeed, it strains the straight-face test.[8] When an attorney signs a complaint (or

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accrued. Nonetheless, by referring to March 8, 2000 as a date by which the plaintiff knew of the factual basis her claim, I do not exclude the possibility that she acquired or should have acquired that knowledge well before March 2000.

[8] A more appropriate concern for the requirements of Rule 11 would have counseled caution in the filing of a complaint that was so clearly time-barred as the one here. *See Brubaker v. City of Richmond*, 943 F.2d 1363, 1385 (4th Cir. 1991)("Where an attorney

other pleading) in a federal district court, he or she certifies that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, (3) the allegations and other factual contentions have evidentiary support or ... are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id.* Fed. R. Civ. P. 11(b). While the reasonable inquiry requirement is not to be taken lightly, Rule 11 does "allow pleadings based on evidence reasonably anticipated after further discovery or investigation." *Rotella v. Wood*, 528 U.S. 549, 560 (2000) (holding that plaintiff's RICO claim was barred by the statute of limitations). Whether an inquiry is "reasonable under the circumstances" takes into account the lack of access to information within the defendant's exclusive control. *See Robinson v. Dean Witter Reynolds, Inc.*, 129 F.R.D. 15, 22 (D. Mass. 1989) ("If the lawyer has only limited ... access to information prior to filing, it is reasonable for her to conduct a less extensive inquiry ...." (quoting Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L. Rev. 630, 642-43 (1987))). Moreover, an attorney's reliance on public reports of circumstances alleged in a complaint may be a reasonable inquiry for purposes of Rule 11(b). *Cook v.*

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knows that a claim is time-barred and has no intention of seeking reversal of existing precedent. . . he makes a claim groundless in law and is subject to Rule 11 sanctions."); *McHenry v. Utah Valley Hosp.*, 724 F. Supp. 835, 838 (D. Utah 1989) (concluding that "a reasonable inquiry into the law would have shown that [the plaintiff]'s claim was time-barred and the statute of limitations is constitutionally sound," and awarding Rule 11 sanctions); *Murphy v. Klein Tools, Inc.*, 123 F.R.D. 643, 646-47 (D. Kan. 1988) (citing circuit and district court cases where courts found "sanctionable conduct under Rule 11 for bringing claims clearly time-barred under the respective statutes of limitations.").

Rockwell Int'l Corp., 147 F.R.D. 237, 246 (D. Colo. 1993).[9]

Here, there was an abundance of information available prior to March 8, 2003 that the plaintiff's attorneys could have used to conduct an inquiry comporting with the requirements of Rule 11(b). Most notably, the detailed findings in *Salemme* - - based on sworn testimony taken in hearings that spanned a year and produced 17,000 pages of transcripts, 141 F.2d at 163 - - provided an ample factual basis for performing such an inquiry years before the plaintiff filed her complaint. Moreover, the fact that the attorneys for the plaintiff relied on *Salemme* in drafting the complaint filed on April 2, 2003 is proof positive that the opportunity for a reasonable inquiry was available within the period of limitations.

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[9] *See also Forbes v. Eagleson*, 19 F. Supp. 2d 352, 375-76 (E.D. Pa. 1998) (holding that the plaintiffs' RICO claims were time-barred, and explaining that reliance on a report written by a lawyer and based on extensive investigations would have satisfied Rule 11(b); also explaining that "[p]laintiffs would have acted consistent with Rule 11" if, after having read news articles describing "self-enriching" schemes between RICO defendants, the plaintiff had "simply contacted sources cited by [the media reports]"); *Greenfield v. U.S. Healthcare, Inc.*, 146 F.R.D. 118, 125 (E.D. Pa. 1993) (attorney who had relied on articles in respected newspaper and industry- publications, publicly available documents, and securities law in filing class action securities litigation complied with Rule 11(b)); *In re Air Disaster at Lockerbie, Scotland*, 144 F.R.D. 618, 621 (E.D.N.Y. 1992) ("[P]arties and their attorneys may base their complaints and requests for discovery on ... hearsay reports and statements of others until such time, if ever, as they are satisfied that the statements ... are not competent or are otherwise untrustworthy."); *Kamerman v. Steinberg*, 113 F.R.D. 511, 514-15 (S.D.N.Y. 1986) (news articles and public documents provide a reasonable factual basis for claims based on securities violations).

IV. CONCLUSION

For the reasons stated above, the motions of the United States, Fitzpatrick, and Morris to dismiss are GRANTED.

SO ORDERED.

/s/ REGINALD C. LINDSAY
United States District Judge

DATED: September 28, 2004

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 05-1905

ESTATE OF ARTHUR M. BARRETT BY ELAINE BARRETT, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF ARTHUR M. BARRETT,
Plaintiff, Appellant,

v.

UNITED STATES, ET AL.,
Defendants, Appellees.

JUDGMENT

Entered: September 7, 2006

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's orders of dismissal entered on October 28, 2004, December 1, 2004, and April 15, 2005, which underlay Plaintiffs June 14, 2005 appeal, are affirmed. No costs shall be taxed against Plaintiff.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk

[cc: Mr. Eiser, Ms. Bosshardt, Mr. Frank, Mr. Waldman, Mr. Greenspan, Mr. Parker, Mr. Mullane, Mr. Louison, Mr. Pfaff, Mr. Brown, Ms. Miller Brown, Mr. Rose, Mr. Bowman, Mr. Fitzsimmons, Mr. Roach, Mr. Glynn, & Mr. Cooley.]

APPENDIX C

United States Court of Appeals
For the First Circuit

No. 05-1905

ESTATE OF ARTHUR M. BARRETT BY ELAINE BARRETT, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF ARTHUR M. BARRETT,

Plaintiff, Appellant,

v.

UNITED STATES, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS
[Hon. Reginald C. Lindsay, U.S. District Judge]

Before

Lipez and Howard, Circuit Judges,
and Hug,* Senior Circuit Judge.

Earle C. Cooley, with whom Kevin M. Glynn and Cooley Manion Jones LLP were on brief, for appellant.
Joshua Waldman, Appellate Staff Attorney, with whom Peter D. Keisler, Assistant Attorney General,

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* Of the Ninth Circuit, sitting by designation.

Michael J. Sullivan, United States Attorney, and Robert S. Greenspan, Appellate Staff Attorney, were on brief, for United States.

Stephen C. Pfaff, with whom Douglas I. Louison, Merrick, Louison & Costello, LLP, William A. Brown, Alan D. Rose, Alan D. Rose, Jr., Richard E. Bowman, Rose & Associates, Brian P. Fitzsimmons, Hanley, Hassett & Fitzsimmons, LLC, Christine M. Roach, and Roach & Carpenter, PC were on brief, for appellees Roderick Kennedy, Robert Fitzpatrick, James Ring, James Ahearn, and James Greenleaf.

September 7, 2006

LIPEZ, Circuit Judge. This case is the latest in a series of tragic cases arising out of the FBI's mishandling of informants drawn from organized crime. Elaine Barrett (or "Plaintiff"), in her capacity as administratrix of the estate of her deceased husband, appeals from the dismissal of her claims under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 1346(b), 2671-2680 (2000), the Fourth and Fifth Amendments to the Constitution, and Massachusetts' wrongful death statute, Mass. Gen. Laws ch. 229, § 2, due to her failure to file within the applicable two- and three-year statutes of limitations. The government and the individual defendants ("Defendants") argue that we have no jurisdiction to review the dismissal of these claims and, alternatively, that Plaintiff's claims are time-barred.

While we recognize the tragedy experienced by Barrett and his loved ones, the technical requirements of the FTCA and related laws are clear, they serve important purposes, and we are bound to follow them. Although we have jurisdiction to consider this appeal, we do not have jurisdiction to review Plaintiff's FTCA

claim against the government because Plaintiff did not exhaust her administrative remedies. Plaintiff's constitutional and wrongful death claims likewise fail because Plaintiff waited more than three years to file her complaint after the accrual of her cause of action. We therefore affirm the district court's orders of dismissal appealed from on June 14, 2005.

I.

In 1983, Plaintiff's spouse was kidnapped and murdered by James Bulger, Stephen Flemmi, and Kevin Weeks. The Federal Bureau of Investigation ("FBI") protected Bulger and Flemmi, both of whom served as confidential informants for the FBI, from arrest, prosecution, and investigation for this and other crimes in order to maintain them as confidential informants. On September 15, 1999, the District Court of Massachusetts (Wolf, J.) issued a decision in United States v. Salemme, 91 F. Supp. 2d 141 (D. Mass. 1999), which discussed the FBI's relationship with Bulger and Flemmi and the protection from criminal prosecution that the agency afforded them. The Salemme decision specifically mentioned Bulger's and Flemmi's slaying of Barrett, and noted that the FBI had been informed that Bulger was responsible for Barrett's murder. Id. at 257-57. In January 2000, Barrett's body was exhumed from a gully alongside the Southeast Expressway in Dorchester, Massachusetts, although post-mortem determinations and procedures sufficient to identify and permit release of his remains were not completed for another three months. On March 9, 2000, in response to the reported positive identification of Barrett's remains, Plaintiff told reporters that, "I think the government is responsible because if they put them away when they should have, Bucky would be alive today. They gave them a license to kill and do whatever they wanted." Barrett's body was released to Plaintiff on April 3, 2000.

On January 14, 2003, Elaine Barrett, Arthur Barrett's widow and the administratrix of his estate, presented to the government (i.e., the Department of Justice ("DOJ") and the FBI) an administrative tort claim under the FTCA, notifying the government of "Barrett's injuries and wrongful death caused by the negligent and wrongful acts or omissions of [its] employees." On April 2, 2003, before the government denied the administrative claim and before six months had passed, Plaintiff filed a complaint in the U.S. District Court of Massachusetts, seeking redress from the government pursuant to the FTCA, and seeking redress from eight former FBI agents, James Bulger, Stephen Flemmi, and Kevin Weeks pursuant to the Fourth and Fifth Amendments (under Bivens v. Six Unknown Agents of the Fed'l Bureau of Narcotics, 403 U.S. 388 (1971))[1] and Massachusetts' wrongful death statute. On April 15, 2003, the DOJ denied the FTCA claim as untimely based on the FTCA's two-year statute of limitations.

In November 2003, the government filed a motion to dismiss. Former FBI agents John Morris and Robert Fitzpatrick filed motions to dismiss in December 2003 and January 2004, respectively. On September 28, 2004, the district court, in a written opinion, dismissed Plaintiff's claims against the government as untimely under the FTCA's two-year statute of limitations, and against Morris and Fitzpatrick as untimely under the applicable three-year statute of limitations for Plaintiff's Bivens and wrongful death claims. On October 28, 2004, Plaintiff appealed the September 28, 2004 Order.

On December 1, 2004, "for the reasons set forth in the [September 28, 2004 Order]," the district court dismissed Plaintiff's claims against John J. Connolly,

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[1]"The Bivens doctrine allows constitutional claims against federal officials, in their individual capacities, for actions taken under color of federal law." McCloskey v. Mueller, 446 F.3d 262, 271 (1st Cir. 2006).

Jr. and James Ahearn. On April 14, 2005, we dismissed Plaintiff's October 28, 2004 appeal "on the ground that we lack jurisdiction absent certification under Fed. R. Civ. P. 54(b)."

The following day, on April 15, 2005, the district court dismissed Plaintiff's claims against the three remaining FBI agents: James Ring, James Greenleaf, and Rod Kennedy.[2] One month later, on June 14, 2005, Plaintiff appealed this order, together with "each previous order of dismissal entered in this action," i.e., the September 28, 2004 Order and the December 1, 2004 Order. That same day, Plaintiff filed in the district court a motion for entry of immediate judgment against the dismissed defendants. The district court dismissed this motion without prejudice "in the absence of the filing of a set of proposed findings that meet the requirements of Fed. R. Civ. P. 54(b)." Plaintiff did not file any set of findings. Thus, the district court did not direct the entry of judgment against the dismissed defendants pursuant to Fed. R. Civ. P. 54(b).

On July 22, 2005, we issued an order responding to the June 14, 2005 appeal, stating that "[b]ecause the orders of dismissal do not appear to be appealable final orders[,] and claims against other defendants remain pending in the district court, this court does not appear to have jurisdiction to consider this appeal absent certification pursuant to Fed. R. Civ. P. 54(b)." We also noted that "the notice of appeal as to 'each previous order of dismissal entered in this case'" – i.e., the September 28, 2004 Order and the December 1, 2004 Order – "appears to be untimely" because it was not filed within 60 days of the order from which it was appealed, as required by Fed. R. App. P. 4(a)(1). We thus required Plaintiff to move for voluntary dismissal or show cause why the appeal should not be dismissed. Plaintiff filed a showing of

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[2] Plaintiff's claim against former agent H. Paul Rico terminated by law on September 29, 2004 as a result of his death.

cause. On September 20, 2005, we issued an order "allow[ing] the case to proceed for now, without prejudice to reconsideration of the jurisdictional question by the merits panel."[3]

On September 27, 2005, the district court issued notices of default against Bulger, Flemmi, and Weeks. The following day, on September 28, 2005, the district court vacated the notice of default against Bulger because "no service ha[d] been made," and entered final judgment "in favor of defendants against Plaintiff" on September 28, 2005, pursuant to Fed. R. Civ. P. 58.[4] Plaintiff did not appeal the entry of final judgment, but rather continued to rely for her appeal on the notice of appeal filed on June 14, 2005.

II.

We review the district court's grant of Defendants' motions to dismiss de novo. Patterson v. United States, 451 F.3d 268, 270 (1st Cir. 2006). In so doing, we "tak[e] the allegations in the complaint as true and mak[e] all reasonable inferences in favor of plaintiff." Doran v. Mass. Turnpike Auth., 348 F.3d 315, 318 (1st Cir. 2003). We may affirm on any basis supported by the record. Carroll v. Xerox Corp., 294 F.3d 231, 241 (1st Cir. 2002).

A. Appellate Jurisdiction

1. Timeliness of Notice of Appeal

Courts of appeals may only hear appeals from "final decisions" of district courts. 28 U.S.C. § 1291. "[T]he term 'final decision' normally refers to a final judgment." Sell v. United States, 539 U.S. 166, 176 (2003). "[A] judgment is final only where it 'leaves

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[3] Three of the eight former FBI agents sued by Plaintiff did not join Defendants' opposition brief: Morris, Connolly, and Rico (deceased).

[4] No final judgment appears to have been entered against Bulger and the fifty John Doe defendants, who were never served.

nothing for the court to do but execute the judgement.'" Consol. Rail Corp. v. Fore River Ry. Co., 861 F.2d 322, 325 (1st Cir. 1988) (quoting Catlin v. United States, 324 U.S. 229, 233 (1945)). It is undisputed that the district court entered a final judgment against all Defendants on September 28, 2005. It is also undisputed that Plaintiff did not appeal that final judgment. Instead, Plaintiff relied on the notice of appeal filed on June 14, 2005 -- more than three months prior to the entry of final judgment. In order to exercise jurisdiction over this action, we must find that either: (1) the June 14, 2005 appeal was timely because the orders of dismissal underlying that appeal were final; or, if the orders were not final (2) the premature appeal ripened into a timely notice of appeal following the entry of judgment on September 28, 2005.

a. Finality as of June 14, 2005

i. Rule 54(b) Certification

When a plaintiff sues multiple parties and a district court disposes of the claims against some but not all of the defendants, the district court's decision is ordinarily not a final, appealable judgment unless the district court separately certifies judgment against the relevant defendants pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. See Nichols v. Cadle Co., 101 F.3d 1448, 1449 n.1 (1st Cir. 1996). The district court did not certify judgment against any of the defendants on either June 14, 2005 or any time thereafter. As Defendants note, the district court could have certified a final judgment as to those defendants dismissed prior to the June 14, 2005 appeal pursuant to Rule 54(b), and that partial judgment would have been appealable. But the district court did not do that. In fact, the district court denied Plaintiff's motion to certify a final judgment pursuant to Rule 54(b) in the absence of the filing of a set of proposed facts that

complied with that Rule. Therefore, the orders of dismissal appealed from on June 14, 2005 did not become final by virtue of Rule 54(b), and are not appealable on that basis.

ii. Served Versus Unserved Defendants

Plaintiff contends that even though the district court did not certify that the orders appealed from on June 14, 2005 were final pursuant to Rule 54(b), these orders were nevertheless final because they disposed of the claims against all of the defendants who were served with process. According to Plaintiff, "[i]t is widely agreed that defendants who have not been served with process are not counted [for purposes of finality]; a disposition as to all those who have been served is final" (quoting 15A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3914.7 (2d ed. 1992)). See Manley v. City of Chicago, 236 F.3d 392, 395 (7th Cir. 2001) (holding that presence of unserved defendant does not defeat finality); accord Cooper v. Pickett, 137 F.3d 616, 621-22 (9th Cir. 1997); Ins. Co. of No. Am. v. Dealy, 911 F.2d 1096, 1099 (5th Cir. 1990). Although Defendants concede that unserved defendants are not counted for purposes of finality, we need not decide that point of law in this case. Defendants argue that even if the disposition of claims against all served defendants renders a district court's decision final, the orders of dismissal underlying the June 14, 2005 appeal did not dispose of the claims against all of the served defendants and, therefore, did not constitute a final disposition. We agree.

When Plaintiff filed her appeal on June 14, 2005, the district court had dismissed Plaintiff's claims against all defendants except Flemmi, Weeks, Bulger, and the fifty John Does. While Bulger and the fifty John Does had not been served, the record

indicates that Flemmi and Weeks had been served. The docket reveals that Plaintiff filed a proof of compliance with waiver of service with respect to Flemmi and Weeks, among other Defendants. The docket entries for September 27 and 28, 2005 further state that the district court entered default judgments against Flemmi and Weeks but not Bulger for whom "[n]o service has been made."

Various statements by Plaintiff support this conclusion. In her brief to us, Plaintiff states that "[t]he district court has entered final decisions dismissing all claims in the complaint against all served defendants, leaving only James Bulger, who is a fugitive from justice and an unserved defendant." (Emphasis added; citations omitted.) Plaintiff further states that after "enter[ing] defaults against Bulger, Flemmi and Weeks" on September 27, 2005, "the default against Bulger was vacated because he had not been served with process. The defaults against Flemmi and Weeks remained for failure to plead or otherwise defend. . . ." Plaintiff likewise states in her reply brief that "[a]ll defendants have been served or appeared, except Bulger, Flemmi and Weeks," indicating that while Flemmi and Weeks had not appeared, they had been served. (Emphasis added.)[5] Therefore, the outstanding claims against Flemmi and Weeks defeated finality at the time of the June 14, 2005 appeal, thereby making the notice of appeal untimely.

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[5] At oral argument, counsel for plaintiff stated that Flemmi and Weeks were never served, and that default judgment was entered against Plaintiff – not Flemmi and Weeks. This is incorrect. The notice of default states that "[f]or failure of the defendants Kevin Weeks, James Bulger, and Stephen J. Flemmi to plead or otherwise defend as provided by Rule 55(a) of the Federal Rules of Civil Procedure, notice is hereby given that the defendants have been defaulted this 27th day of September, 2005." This notice was subsequently vacated against Bulger for lack of service.

b. Finality as of September 28, 2005

Since Plaintiff cannot show that the orders appealed from on June 14, 2005 were final and thus appealable, we must determine whether Plaintiff's premature June 14, 2005 appeal nevertheless ripened into a timely notice of appeal after the entry of judgment against all of Defendants on September 28, 2005. Federal Rule of Appellate Procedure 4(a)(2) addresses premature notices of appeal, stating that "[a] notice of appeal filed after the court announces a decision or order -- but before the entry of judgment or order -- is treated as filed on the date of and after the entry." In FirsTier Mortgage Co. v. Investors Mortgage Insurance Co., 498 U.S. 269 (1991), the Supreme Court held that "Rule 4(a)(2) permits a notice of appeal filed from certain nonfinal decisions to serve as an effective notice from a subsequently entered final judgment." Id. at 274. The Supreme Court cautioned, however, that Rule 4(a)(2) does not render all premature notices of appeal effective upon the entry of final judgment. On the contrary, "Rule 4(a)(2) permits a notice of appeal from a nonfinal decision to operate as a notice of appeal from the final judgment only when a district court announces a decision that would be appealable if immediately followed by the entry of judgment." Id. at 276.

If the district court had ordered the dismissal of Plaintiff's claims against all Defendants prior to Plaintiff's appeal, and had entered final judgment against them after the Plaintiff's appeal, this would be an easy case. Under FirsTier, since the orders of dismissal would have been appealable once the perfunctory entry of judgment was made, Plaintiff's premature notice of appeal would ripen into a timely notice after the entry of final judgment. See id. at 277 (holding that premature appeal of bench ruling which

"purport[ed] to dispose of all of [plaintiff's] claims" ripened upon entry of final judgment).

Here, however, the district court ordered the dismissal of Plaintiff's claims against some -- but not all -- Defendants prior to Plaintiff's appeal. Thus, the orders appealed from "w[ere] not literally [] decision[s] that would be appealable if immediately followed by the entry of judgment." Clausen v. Sea-3, Inc., 21 F.3d 1181, 1186 (1st Cir. 1994). Because claims against Flemmi and Weeks remained, Plaintiff's appeal "did not dispose of all the claims in the case. Therefore, judgment could not perfunctorily be entered following the ruling absent the certification called for by [Rule 54(b)]." Id. (emphasis omitted).

In Clausen, we extended FirsTier's holding to decisions involving fewer than all claims or fewer than all parties. There, we held that a premature notice of appeal of a decision disposing of some but not all claims ripened into an effective notice because the decision would have been appealable if immediately followed by certification pursuant to Rule 54(b). See 21 F.3d at 1186 (noting that a decision that was appropriate for immediate appeal pursuant to Rule 54(b) was "close enough to a decision that would be appealable if immediately followed by the entry of judgement." (internal quotation marks and emphasis omitted)); see also In re Bryson, 406 F.3d 284, 288 (4th Cir. 2005) ("[While] the FirsTier Court had no occasion to consider an entry of judgment pursuant to [Rule 54(b)]: [] nothing in FirsTier indicates that its holding does not apply to such judgments. And rightly so: a judgment properly certified by a district court pursuant to [Rule 54(b)] . . . is just as final as one made final pursuant to other rules."). This case is consistent with Clausen -- the orders of dismissal would have been appealable if certified pursuant to 54(b). We indicated as much in our July 22, 2005 order, in which we noted that "claims against other defendants remain pending in the district court" and

directed Plaintiff to show cause why the appeal should not be dismissed absent certification pursuant to Rule 54(b).

Defendants attempt to distinguish Clausen. The premature notice in that case ripened upon the entry of a Rule 54(b) certification. As defendants point out, the decision in this case was never, in fact, certified. Rather, final judgment was entered pursuant to Fed. R. Civ. P. 58. This argument is unavailing. FirsTier's inquiry is a hypothetical one: would the decision underlying the premature notice have been appealable immediately following entry of judgment? See Outlaw v. Airtech Air Conditioning and Heating, Inc., 412 F.3d 156, 162 (D.C. Cir. 2005) ("[FirsTier] asks hypothetically whether the nonfinal decision from which an appeal was noted would be appealable if immediately followed by the entry of judgment." (internal quotation marks, citation, and emphasis omitted)). In Clausen, we placed a gloss on FirsTier's hypothetical inquiry: would the decision underlying the premature notice have been appealable immediately following certification pursuant to Rule 54(b)? See Clausen, 21 F.3d at 1186 ("[The district court] had to satisfy itself and certify that the decision was, in effect, appropriate for immediate appeal, pursuant to [Rule 54(b)], notwithstanding its failure to resolve all claims made in the lawsuit."). It does not matter that the underlying orders of dismissal, although certifiable at the time of the June 14, 2005 appeal, were never, in fact, certified, but rather were made final by the entry of a final judgment on September 28, 2005. "Although the hypothetical judgment in FirsTier was identical to the kind of judgment eventually entered, nothing in FirsTier requires that the hypothetical judgment considered in applying its test be the same type as the one actually entered." Outlaw, 412 F.3d at 162. All that is required is that "[t]here must at some point prior to consideration of the appeal actually have been a final

appealable judgment of some sort entered." Id. (emphasis added).

Defendants concede that "the district court could have certified a final judgment as to th[e relevant] defendants under [Rule 54(b)], and that partial judgment would have been appealable." In other words, the decision "would have been appealable immediately" by virtue of Rule 54(b). Therefore, Plaintiff's premature notice of appeal ripened upon the entry of final judgment on September 28, 2005. Defendants failure to cite any authority in support of its argument, together with the wealth of authority supporting the timeliness of such appeals, bolsters this conclusion. See Outlaw, 412 F.3d at 162 (holding that a premature notice of appeal of decision disposing of plaintiff's claims against some but not all defendants — which would have been appealable pursuant to Rule 54(b) -- ripened upon the entry of final judgment); accord Garwood Packaging, Inc. v. Allen & Co., Inc., 378 F.3d 698, 701 (7th Cir. 2004) (holding that premature notice of appeal "took effect when, the last defendant having been dismissed, the decision became final"); Ruiz v. McDonnell, 299 F.3d 1173, 1179-80 (10th Cir. 2002) (holding that plaintiff's notice of appeal filed after the dismissal of all except one defendant ripened upon the district court's entry of default judgment against the remaining defendant); id. at 1179 ("[A] notice of appeal filed before the district court disposes of all claims is nevertheless effective if the appellant obtains either certification pursuant to [Rule 54(b)] or final adjudication before the court of appeals considers the case on its merits."). We therefore have jurisdiction to consider Plaintiff's appeal.

2. Exhaustion under the FTCA

Notwithstanding the timeliness of Plaintiff's appeal, we must next determine whether Plaintiff

exhausted her administrative remedies under the FTCA. The United States, as a sovereign, cannot be sued absent an express waiver of its immunity. FDIC v. Meyer, 510 U.S. 471, 475 (1994); see also Skwira v. United States, 344 F.3d 64, 72 (1st Cir. 2003). The FTCA is such a waiver. It permits individuals to sue the government "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1); see also 28 U.S.C. § 2674 ("The United States shall be liable [with respect] . . . to tort claims[] in the same manner and to the same extent as a private individual under like circumstances").

"The waiver effected by the FTCA is, however, closely circumscribed by the terms of the statute." Rakes v. United States, 442 F.3d 7, 18 (1st Cir. 2006). "[T]o ensure that 'meritorious claims can be settled more quickly without the need for filing suit and possible expensive and time-consuming litigation,'" the FTCA includes an administrative exhaustion requirement. Pascale v. United States, 998 F.2d 186, 188 (3d Cir. 1993) (quoting S. Rep. No. 1327, 89th Cong., 2d Sess. 6 (1966), reprinted in 1966 U.S.C.C.A.N. 2515, 2517) (internal brackets omitted). 28 U.S.C. § 2675(a) states that

> [a]n action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been

> finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

In short, Plaintiff may not file a tort claim in district court until (i) the agency finally denies the administrative claim, or (ii) six months pass without a final denial of the administrative claim -- whichever comes first.

The government argues that the district court lacked jurisdiction to review Plaintiff's FTCA claim because it was filed on April 2, 2003 -- before the DOJ issued its denial of Plaintiff's administrative tort claim (on April 15, 2003), and within the six-month waiting period otherwise required. Plaintiff argues that while she filed her complaint before the administrative denial, she "did not serve or attempt to serve any defendant" until September 29, 2003 -- well "after the [administrative] claim was denied on April 15, 2003." Thus, Plaintiff argues, "[t]his action was begun when service of process was made after denial of plaintiff['s] administrative claim." We disagree.

Plaintiff does not cite any authority for the proposition that we should look at the date of service of process as opposed to the date on which the complaint was filed in determining whether Plaintiff exhausted her administrative remedy. We also have not found any such authority. On the contrary, the plain language of the statute and Supreme Court case law interpreting the statute point to the opposite conclusion. Section 2675(a) states, in relevant part, that "[a]n action shall not be instituted upon a claim against the United States" unless the claimant first presents the claim to the appropriate Federal agency

and the claim is finally denied. (Emphasis added.) According to the Supreme Court, "the word 'institute' is synonymous with the words 'begin' and 'commence.'" McNeil v. United States, 508 U.S. 106, 112 (1993). Pursuant to Rule 3 of the Federal Rules of Civil Procedure, "[a] civil action is commenced by filing a complaint with the court." Thus, an action is instituted for purposes of section 2675(a) when the complaint is filed. See McNeil, 508 U.S. at 112 (rejecting the argument that an action is instituted when "substantial progress has been made in the litigation").

Plaintiff's other arguments fare no better. Plaintiff contends that since she complied with the FTCA's statute of limitations under 28 U.S.C. § 2401(b) -- the only statutory provision referenced in the DOJ's denial of her administrative tort claim -- we have jurisdiction to review her FTCA claim. This argument is incorrect.

Section 2401(b) states that

> [a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented.

Even if we assume that Plaintiff's claim was brought within the time allotted by section 2401(b), this timeliness has nothing to do with whether Plaintiff has satisfied the FTCA's exhaustion requirement under section 2675(a). Section 2401(b) limits the time a claimant has to file its administrative tort claim and complaint, respectively. Specifically, the statute requires that a claimant present an administrative tort

claim to the appropriate government agency within two years of accrual of the claim, and, assuming the claim is denied, file a complaint in district court within six months of notice of final denial by the agency. Section 2675(a), on the other hand, prescribes what a claimant must do before bringing an FTCA claim in federal court. Specifically, the statute requires that the claimant wait for a final disposition from the agency (or, in lieu thereof, the passage of six months without a final disposition) before filing the complaint. Plaintiff's contention that her alleged compliance with section 2401(b)'s statute of limitations relieved her of section 2675(a)'s exhaustion requirement is therefore unavailing.

In a related argument, Plaintiff contends that "by waiting out the response time on the administrative claim" under the FTCA, "the agency could cause the statute of limitations to expire on Bivens claims or force separate suits." While that may be true in this case,[6] the remedy is for Plaintiff to file separate claims, which would not be barred by the rule against claim-splitting. See Torromeo v. Fremont, 438 F.3d 113, 117 (1st Cir. 2006); see also Restatement (Second) of Judgments § 26(1)(c) (allowing exception to rule against claim-splitting where "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts . . . and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief."). We cannot read the exhaustion requirement out of the FTCA. See McNeil, 508 U.S. at 113 ("The FTCA bars claimants from bringing suit in federal court until they

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[6] Plaintiff argues that if she had waited six months to file her complaint in district court, i.e., July 14, 2003, her claim would have fallen outside of the three-year statute of limitations under Bivens and state tort law, which required her claim to be filed by April 3, 2003.

have exhausted their administrative remedies."); see also Acosta v. U.S. Marshals Service, 445 F.3d 509, 513 (1st Cir. 2006) ("The [FTCA] also contains an exhaustion requirement, which has been viewed as 'a non-waivable jurisdictional requirement' limiting the suit to claims fairly made to the agency." (quoting Santiago-Ramirez v. Sec'y of Dep't of Def., 984 F.2d 16, 18, 19-20 (1st Cir. 1993)).

Finally, Plaintiff implies that since Defendants raised this argument "for the first time" on appeal, we cannot review it. This argument is unavailing. "[An] objection to subject matter jurisdiction is not waivable and may be raised for the first time on appeal." F.A.C., Inc. v. Cooperativa de Seguros de Vida de Puerto Rico, 449 F.3d 185, 189 (1st Cir. 2006). By filing the complaint in the absence of agency action and in less than six months of filing her administrative tort claim, Plaintiff failed to exhaust her remedies. We therefore lack jurisdiction to review Plaintiff's FTCA claim against the government.

B. Merits

Plaintiff's Bivens and wrongful death claims are subject to a three-year statute of limitations. See Mass. Gen. Laws ch. 229, § 2 (stating that "an action to recover damages [for wrongful death] shall be commenced within three years"). While Congress has not established a limitations period for Bivens claims, "courts generally have applied state statutes of limitations to Bivens actions notwithstanding the fact that such actions lie only against federal officers." Rossiter v. Potter, 357 F.3d 26, 34 n.7 (1st Cir. 2004); see also Wilson v. Garcia, 471 U.S. 261, 266-67 ("When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so."). We need not decide between Massachusetts'

statute of limitations for tort actions, Mass. Gen. Laws ch. 260, § 2A, and Massachusetts' statute of limitations for civil rights actions, Mass. Gen. Laws ch. 260, § 5B, in determining the limitations period for Plaintiff's Bivens claims, since both statutes of limitations are three years. See Street v. Vose, 936 F.2d 38, 39 n.2 (1st Cir. 1991).

This three-year limitations period commenced upon the "accrual" of Plaintiff's claims. While state law establishes the statute of limitations for Bivens claims, "the question of when a cause of action accrues in a civil rights case is a matter of federal law." Nieves v. McSweeney, 241 F.3d 46, 52 (1st Cir. 2001). "Under federal law, the statute of limitations on a Bivens claim begins to run when the plaintiff knows or has reason to know of the existence and cause of the injury which is the basis of his action." Van Tu v. Koster, 364 F.3d 1196, 1199 (10th Cir. 2004). As to Plaintiff's wrongful death claim, the accrual period provided by the statute itself is similar: "three years from the date of death, or within three years from the date when the deceased's executor or administrator knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action." Mass. Gen. Laws ch. 229, § 2. Thus, for both the Bivens and wrongful death claims, the three-year limitations period commenced when Plaintiff had either actual knowledge or constructive knowledge of her husband's death and "sufficient facts to permit a reasonable person to believe that there [wa]s a causal connection between the government and her [husband's death]." Skwira, 344 F.3d at 78.[7]

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[7] We acknowledge that the formulation of the accrual standard we apply here is taken from Skwira, which addressed the accrual of FTCA claims rather than Bivens claims. See Skwira, 344 F.3d at 78. However, the formulation in Skwira is comparable to the accrualstandard used in the Bivens context. See, e.g., Nasim v. Warden, Md. House of Correction, 64 F.3d 951, 955 (4th Cir. 1995)(en banc)(stating as to Bivens actions that "[u]nder federal law a cause ofaction accrues when the plaintiff possesses

As the district court noted, Plaintiff must have knowledge of facts sufficient to permit a reasonable person to believe that: "Bulger and Flemmi were instrumental in the murder of Barrett[;] Bulger and Flemmi were informants for the FBI[;] and [] the FBI . . . protected and encouraged Bulger and Flemmi in their criminal activity, including Barrett's murder." While "[a] claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim," McIntyre v. United States, 367 F.3d 38, 52 (1st Cir. 2004) (internal quotation marks and citation omitted), "conclusive knowledge is not necessary." Skwira, 344 F.3d at 78.

Plaintiff filed her complaint on April 2, 2003. If her claims accrued prior to April 2, 2000, she was beyond the statute of limitations when she filed the cause of action. Plaintiff argues that she neither "knew [n]or had reason to know that her husband had been murdered by specific persons and that such murder had been caused by law enforcement officials of the federal government" until some time on or after April 3, 2000.[8] Since she filed her complaint on April 2, 2003, Plaintiff argues that her Bivens and wrongful

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sufficient facts about the harm done to him that reasonable inquiry will reveal his cause of action."). As for applying the Skwira formulation to Plaintiff's wrongful death claim, Massachusetts leaves it within the discretion of the court to fashion a precise accrual standard based on the statutory language. Pobieglo v. Monsanto Co., 521N.E.2d 728, 731 (Mass. 1988) ("When the Legislature limits the time within which suit can commence from the date of accrual, it leaves to the court the determination of the precise meaning of the term accrued.").

[8] There is some discrepancy in the record surrounding the date on which Plaintiff contends that her Bivens and wrongful death claims accrued. In her appellate brief, Plaintiff appears to argue that her claims accrued on April 3, 2000 when her husband's body was released to her. However, at oral argument and in a letter submitted to us pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, Plaintiff states that her claims did not accrue until after "Flemmi's guilty plea" on October 14, 2003.

death claims are thus within the three-year statute of limitations. Plaintiff contends that her March 9, 2000 statement, which, according to the district court, "indicate[d] that . . . she knew that the government was responsible for the murder of her husband," was misconstrued by the court. Plaintiff argues that while she stated in the article that "the government is responsible" and that it "gave them a license to kill," she did not directly reference Bulger, Flemmi, the FBI, or any other state or federal agency. Plaintiff also points to a statement that she made to reporters in July 2000 -- stating that, "[w]hoever did it should be brought to justice" -- in support of her argument that she had no knowledge of who killed her husband. Plaintiff further argues that the Salemme decision "contained little more than conjecture and speculation concerning FBI misconduct and culpability in the handling of Bulger and Flemmi and nothing about the murder of Barrett."

Defendants argue that, prior to April 2, 2000, Plaintiff had actual knowledge of facts sufficient to believe that her husband had been killed by persons connected to the federal government, as evidenced by her March 9, 2000 statement. Therefore, Defendants argue that Plaintiff's claims are time-barred. We agree. While Plaintiff's March 9, 2000 statement does not specifically reference Bulger and Flemmi, we agree with Defendants that based on the context of the article, which discusses the positive identification of Barrett's body and Bulger's and Flemmi's involvement in Barrett's death, "there can be no doubt that she is referring to defendants Bulger and Flemmi as actually committing the murder of her husband." Plaintiff's failure to identify the specific government agency responsible for Bulger and Flemmi's actions (i.e., the FBI), moreover, does not undermine the accrual of her claims. Accrual is based on a plaintiff's knowledge of facts sufficient to give rise to a belief that the government -- not any particular agency of the

government -- caused the injury. See Skwira, 344 F.3d at 78 ("[A] claim accrues under the FTCA once a plaintiff knows . . . sufficient facts to permit a reasonable person to believe that there [wa]s a causal connection between the government and her injury." (emphasis added)). Plaintiff's March 9, 2000 statement established her actual knowledge of facts sufficient to believe that the government, through Bulger and Flemmi, caused the death of her husband.[9] We therefore agree with the district court that

> by that statement, the plaintiff has admitted that, not later than March 8,

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[9] Plaintiff argues that the district court should not have relied on Wheeler v. United States, 367 F.3d 38 (1st Cir. 2004), in which we upheld the dismissal of a tort action against the government -- which arose out of the murder of the decedent by FBI informants -- on statute-of-limitations grounds. Id. at 60-61. Rather, Plaintiff argues that the district court should have relied on the consolidated case of McIntyre v. United States, 367 F.3d 38(1st Cir. 2004), in which we vacated the dismissal of a tort action against the government -- which arose out of the murder of an FBI informant by other FBI informants -- on statute-of-limitations grounds. Id. at 57. Plaintiff's argument is without merit. The district properly relied on Wheeler, which is factually similar to this case, and did not rely on McIntyre, which is distinguishable from this case because it involved the murder of an FBI informant whose status was betrayed by the government.

Plaintiff also contends that the statute of limitations on her claims should be equitably tolled for two reasons: first, because of "her fear for the safety of the rest of her family" which presumably delayed her filing of her claims; and second, because of the district court's "disparate treatment of [P]laintiff" as compared to its treatment of the plaintiff in Donahue v. F.B.I., 204 F. Supp. 2d 169 (D. Mass. 2002), whose claim was not barred by the FTCA's statute of limitations. Neither argument appears to have been raised below and neither is developed on appeal. While we have recognized the availability of duress for tolling the FTCA's statute of limitations, Rakes v. U.S., 442 F.3d 7, 26 (1stCir. 2006), Plaintiff cannot argue on appeal issues not raised below or developed only perfunctorily on appeal. See Bonas v. Town of N. Smithfield, 265 F.3d 69, 76 n.5 (1st Cir. 2001) ("[I]ssues raised by an appellant but not developed are deemed waived.").

> 2000, she had actual knowledge of the involvement of Bulger and Flemmi in Barrett's murder, the fact that Bulger and Flemmi were FBI informants at the time of Barrett's murder, and the fact that the FBI encouraged and protected Bulger and Flemmi in the murder of Barrett. In short, her statement indicates that by March 8, 2000, she knew that the government was responsible for the murder of her husband. [10]

III.

The death of Barrett as the result of the FBI's misconduct is a tragedy. The rejection of what might otherwise be a meritorious claim because of the technical requirements of the FTCA and related laws is unfortunate. But these requirements do serve important purposes.[11] It is also a fact that some plaintiffs have succeeded in meeting these requirements. See McIntyre, 367 F.3d at 57; Donahue, 204 F. Supp. 2d at 177-78. In this case, that has not happened. For the foregoing reasons, the district

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[10] Because we find that Plaintiff had actual knowledge of her husband's death and sufficient facts to believe that the government was involved in his death, we need not analyze whether Plaintiff also had constructive knowledge of these facts. See Patterson, 451 F.3d at 271 (distinguishing between actual knowledge and constructive knowledge).

[11] "The purpose of the FTCA's exhaustion requirement is to facilitate the administrative evaluation of tort claims by the agency whose activity gave rise to the claim and permit settlement of meritorious claims more quickly and without litigation." Warrumv. United States, 427 F.3d 1048, 1050 (7th Cir. 2005) (citing McNeil, 508 U.S. at 112 n. 7 (1993). "[T]he primary purpose of a statute of limitations is to prevent plaintiffs from sleeping on their rights and to prohibit the prosecution of stale claims." Edes v. Verizon Communications, Inc., 417 F.3d 133, 142 (1st Cir.2005) (internal quotation marks, citation, and brackets omitted).

court's orders of dismissal entered on October 28, 2004, December 1, 2004, and April 15, 2005, which underlay Plaintiff's June 14, 2005 appeal, are **affirmed**. No costs shall be taxed against Plaintiff.

So ordered.

APPENDIX D

No. 05-1905

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

ESTATE OF ARTHUR M. BARRETT BY ELAINE BARRETT, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF ARTHUR M. BARRETT,
Plaintiff, Appellant

v.

UNITED STATES ET AL.,
Defendants, Appellees.

PETITION OF PLAINTIFF, APPELLANT FOR PANEL REHEARING

Respectfully submitted,
Plaintiff,Appellant
By her attorneys:

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Dated:October 26, 2006

A. INTRODUCTION

On September 7, 2006, this Court entered a 29-page opinion and separate judgment in this appeal in a civil case, to which the United States is a party. The forty-fifth day within which to Petition for Panel Rehearing was Sunday, October 22, 2006. Subject to the allowance of Petitioner's motions for a three-day enlargement of time, this Petition is timely filed on October 26, 2006.

B. POINTS OF LAW OR FACT PETITIONER BELIEVES THE COURT HAS OVERLOOKED OR MISAPPREHENDED

1. This Court found this case to be the latest in a series of tragic cases arising out of the FBI's mishandling of informants drawn from organized crime (OP. p. 3). However, the Petitioner is unaware of any of such cases being allowed or settled during the administrative exhaustion process. These facts have apparently been overlooked in the holding that this Court does not have jurisdiction to review the meritorious FTCA claim against the government because Petitioner did not exhaust her administrative remedies (OP. pp. 3, 18-19, 29). In the Decision in the case at bar, this Court held that the administrative exhaustion requirement exists to ensure that "meritorious claims can be settled more quickly without the need for filing suit and possible expensive and time consuming litigation." (Citations omitted). The FBI and the Justice Department have done little or no settling or approving and much stonewalling of the tragic and meritorious claims from Massachusetts, based on FBI mishandling of informants from organized crime, which have been presented for administrative review. The stonewalling of meritorious

claims has no role to play in the administrative exhaustion process.

2. What has been argued in point 1 is also applicable to this Court's holding that while it may be true that by waiting out the response time on Plaintiff/Petitioner's administrative claims, the agency could cause the statute of limitations to expire on *Bivens* claims or force separate suits, the remedy is for plaintiff to split its claims and start suit on the *Bivens* claims (OP. pp. 21-22). This approach multiplies litigation and is in direct conflict with the important purpose of the administrative exhaustion requirement to minimize litigation. There is no violence done to the administrative exhaustion requirement by the Plaintiff/Petitioner's approach of filing all claims and then holding service until the administrative action is taken.

3. Petitioner believes that both this Court and the district court misapprehended the significance of *United States v. Salemme*, 91 F. Supp.2d 141 (1999) in determining what a reasonable person in Petitioner's position knew, should have known or could have learned about her FTCA claim from the *Salemme* decision (OP. p. 4). The *Salemme* decision contained Judge Wolf's Memorandum and Order dated September 15, 1999, with Clerical Corrections dated December 23, 1999. It must be viewed as to its impact on Petitioner at the time it was issued, not on the basis of what was said about it in the Complaint, in a new unit of time, three and one-half years later.

In the first place, the death of Arthur Barrett played a very small part in the Memorandum and Order of Judge Wolf in *Salemme*. The only mention of Barrett came in Section II, FINDINGS OF FACT, Subsection 25, Joseph Murray, starting at page 256. William Weld testified before Judge Wolf, on May 26, 1998 (Weld, May 26, 1998 Tr. at 78-115), to a series of telephone calls he received in 1988 from a source, later identified as Joseph Murray. Among other things

unrelated to Barrett, Murray claimed to have information that Bulger and Pat Nee had murdered Halloran and Bucky Barrett, Memorandum and Order, p. 256. A cursory investigation of Murray's information furnished to Weld by FBI agents Clark and O'Callahan went nowhere except to confuse that information by yielding a 302 report linking Bulger and Flemmi to the Halloran and Barrett murders (Memorandum and Order, p. 257). There was not a single detail given as to Barrett's murder, whether it was Bulger and Nee or Bulger and Flemmi, and the entire matter was left in an unresolved and undefined state.

The facts needed for Petitioner to realize that she might have the basis for an FTCA claim were not revealed by Judge Wolf's Memorandum and Order, nor by any acknowledgment to Petitioner on the part of any agent or agency, as was the case in the *Callahan, McIntyre, Walter Bennett, Edward Bennett and William Bennett* cases. In the case at bar, the plaintiff was in the same position as was the Donahue family where the court found that the Donahues were the victims of actions by the government officials involved to fraudulently conceal pertinent evidence that would have led the deceased's family to recognize a connection or nexus between the death of Michael Donahue and the actions of the government agents.

The importance of the FBI's handling of the Murray interview and information to the the Petitioner/Plaintiff's cause of action did not emerge fully until late 2000 through 2001 with the publication of Black Mass-The True Story of an Unholy Alliance Between the FBI and the Irish Mob by Dick Lehr and Gerald O'Neil (Copyright 2000, 2001), and Deadly Alliance-The FBI's Secret Partnership with the Mob, by Ralph Renalli (Copyright 2001).

The findings of fact by Judge Wolf must be realistically be combined with the omitted and unnoted fact that Joseph Murray was dead at the time

of Judge Wolf's Memorandum and Order, having died in 1992, shortly after his release from prison. There was no further ability for the Petitioner/Plaintiff to seek the concealed information from Murray in 2000, as the facts of this case began to emerge. She could not possibly have conceived of the nexus between the death of Arthur Barrett and the actions of the Boston FBI office and it is ridiculous to assume that she could have received the information from the FBI

CONCLUSION

Petitioner/Plaintiff should not be left out in the cold with the tragic and meritorious claims in this case-defeated by the government's unconcern for the victims and stonewalling tactics. The unspeakable wrongs done cry out for a remedy. Nothing Petitioner did or failed to do merits her loss of everything and yet that is where she finds herself

Respectfully submitted,
PETITIONER/PLAINTIFF
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CERTIFICATE OF SERVICE

I, Earle C. Cooley hereby certify that I served the foregoing Petition for Panel Rehearing on all counsel of record and on pro se parties via First Class United States mail this 26th day of October, 2006.

/s/ Earle C. Cooley
Earle C. Cooley

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 05-1905

ESTATE OF ARTHUR M. BARRETT BY ELAINE BARRETT, IN HER CAPACITY AS ADMINISTRATRIX OF THE ESTATE OF ARTHUR M. BARRETT,

Plaintiff, Appellant,

v.

UNITED STATES; H. PAUL RICO; JOHN M. MORRIS; JOHN J. CONNOLLY, JR.; RODERICK KENNEDY; ROBERT R. FITZPATRICK; JAMES RING; JAMES AHERN; JAMES GREENLEAF,

Defendants, Appellees,

KEVIN WEEKS; JAMES BULGER; STEPHEN J. FLEMMI; JOHN DOES, 1-50,

Defendants.

Before

Lipez, Circuit Judge,
Hug,* Senior Circuit Judge,
and Howard, Circuit Judge.

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* Of the Ninth Circuit, sitting by designation.

ORDER OF COURT

Entered: December 12, 2006

Appellant's petition for rehearing is denied.

By the Court:

RICHARD CUSHING DONOVAN

Richard Cushing Donovan, Clerk.

[cc: Messrs: Eiser, Bosshardt, Frank, Waldman, Greenspan, Parker, Mullane, Louison, Pfaff, Brown, Rose, Bowman, Rose, Fitzsimmons, Glynn, Cooley, Ms. Roach and Ms. Brown]

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APPENDIX F

McIntyre v. United States of America, 367 F.3d 38 (1st Cir. 2004)

United States Court of Appeals,
First Circuit.

Emily McINTYRE, as Administrator of the Estate of John L. McIntyre; Christopher McIntyre, as Co-administrator of the Estate of John L. McIntyre,

Plaintiffs, Appellants,

v.

UNITED STATES of America,

Defendant, Appellee,

H. Paul Rico; John Morris; John J. Connolly; Roderick Kennedy; Robert Fitzpatrick; James Ring; James Greenleaf; James Ahearn; Kevin J. Weeks; James J. Bulger; Stephen Flemmi; John Does, Nos. 1-50,

Defendants.

Lawrence A. Wheeler, Individually and as Special Administrator of the Estate of Roger M. Wheeler; Patricia J. Wheeler, Individually and as Special Administratrix of the Estate of Roger M. Wheeler; Pamela (Wheeler) Norberg; David B. Wheeler; Mark K. Wheeler,

Plaintiffs, Appellants,

v.

United States of America,

Defendant, Appellee,

John J. Connolly, Jr.; John M. Morris; H. Paul Rico; Robert Fitzpatrick; James A. Ring; James Greenleaf; James Ahearn; James J. Bulger, a/k/a Whitey; Stephen J. Flemmi, a/k/a The Rifleman; John V. Martorano; John Does, Nos. 1-50,

Defendants.

Nos. 03-1791, 03-1823.

Heard March 2, 2004.
Decided May 10, 2004.

Background: In first action, family members of murder victim brought action against United States under Federal Tort Claims Act (FTCA), for negligence in revealing victim's status as a Federal Bureau of Investigations (FBI) informant, which allegedly led to murder of victim by gang members. The United States District Court for the District of Massachusetts, 254 F.Supp.2d 183, Reginald G. Lindsay, J., granted United States motion to dismiss, and appeal was taken. In second action, family members of second murder victim brought suit against the United States under the FTCA alleging that FBI's illicit protection of gang members had facilitated the murder of second victim. The District Court granted United States motion to dismiss, and appeal was taken.

Holdings: In a consolidated appeal, the Court of Appeals, Lynch, Circuit Judge, held that:

(1) claims by family members of first murder victim accrued only when family members learned that the FBI disclosed the victim's informant status;

(2) claims by family members of second murder victim accrued, at the latest, when family member appeared on television news program; and

(3) equitable tolling did not apply to claims brought by family members of second murder victim.

Affirmed in part, reversed in part, and remanded.

William E. Christie, with whom Steven M. Gordon and Shaheen & Gordon, P.A. were on brief, for appellants Emily McIntyre and Christopher McIntyre.

Richard A. Olderman, Attorney, Appellate Staff, with whom Robert S. Greenspan, Attorney, Appellate Staff, Peter D. Keisler, Assistant Attorney General, and Michael J. Sullivan, United States Attorney, were on brief, for appellee United States in the McIntyre case.

Frank A. Libby, Jr., with whom Douglas S. Brooks and Kelly, Libby & Hoopes, P.C. were on brief, for appellants Lawrence A. Wheeler, Patricia J. Wheeler, Pamela (Wheeler) Norberg, David B. Wheeler, and Mark K. Wheeler.

Richard A. Olderman, Attorney, Appellate Staff, with whom Robert S. Greenspan, Attorney, Appellate Staff, Peter D. Keisler, Assistant Attorney General, Michael J. Sullivan, United States Attorney, and Jeffrey S. Bucholtz, Deputy Assistant Attorney General, were on brief, for appellee United States in the Wheeler case.

Before LYNCH, Circuit Judge, CYR, Senior Circuit Judge, and HOWARD, Circuit Judge.

LYNCH, Circuit Judge.

These two cases involve claims against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, arising out of alleged wrongful actions of FBI agents.

On September 15, 1999, a diligent federal trial judge sitting in an organized crime case issued a lengthy opinion outlining a possible pattern of corruption involving at least two FBI agents, John Connolly and his supervisor John Morris, and two notorious Boston criminals, James "Whitey" Bulger and Stephen "the Rifleman" Flemmi. *See United States v. Salemme*, 91 F.Supp.2d 141 (D.Mass.1999). Such corruption had been rumored but had been denied by the FBI.

The 1999 opinion by Judge Wolf revealed that Bulger and Flemmi, who were leaders of the Winter Hill Gang, a crime syndicate involved in murder, bribery, extortion, loansharking, and gambling operations, had been high-level FBI informants since the 1970s, aiding the agency in its investigation of La Cosa Nostra, a rival crime syndicate. The opinion raised the prospect that Bulger and Flemmi had received numerous benefits from the FBI in return, including protection from prosecution, and at times, access to the names of informants who were themselves providing information to the FBI about the criminal activities of Bulger and Flemmi. *Id.* at 148-63, 322. Some of the informants may have been killed as a result, and the murderous activities of Bulger and Flemmi covered up. *Id.* at 208-13.

The opinion speculated that Agent Connolly may have disclosed to Bulger and Flemmi the identity of an individual, John McIntyre, who was an informant for the local Quincy police and was debriefed by the FBI, United States Customs Service, and the Drug Enforcement Administration (DEA). *Id.* at 213-15. McIntyre disappeared roughly six weeks after an October 17, 1984 interview with FBI Agent Roderick Kennedy, in which McIntyre had linked Bulger to gun-running and drug-smuggling operations. *Id.* His body was found fifteen years later, on January 14, 2000, in a makeshift grave near Boston. But the opinion,

published in September 1999, ultimately concluded that it could not be determined whether FBI Agent Kennedy had, in fact, shared this information about McIntyre with Connolly and whether Connolly, in turn, had told Bulger. *Id.* at 214-15. That was because, as the court said later, "important FBI documents concerning John McIntyre were ... improperly withheld by agents of the Boston FBI until it was too late to question relevant witnesses concerning them." *United States v. Flemmi*, 195 F.Supp.2d 243, 249-50 (D.Mass.2001).

The opinion also indicated the likelihood that Agent Connolly had disclosed to Bulger the name of another informant as to Bulger's crimes, Brian Halloran. In January 1982, Halloran told two FBI agents that Bulger and Flemmi had caused the 1981 murder of a Tulsa businessman, Roger Wheeler. Connolly learned of Halloran's cooperation and disclosed it to Bulger. Halloran was murdered in May 1982. *Salemme*, 91 F.Supp.2d at 208-210. Agent Morris testified to this sequence of events in hearings before Judge Wolf in April 1998.

Agent Connolly was indicted on October 11, 2000 and charged with numerous crimes, including "alert[ing] Bulger and Flemmi to the identity of confidential law enforcement informants in order to protect Bulger's and Flemmi's ongoing criminal activities" and taking other steps to protect Bulger and Flemmi. Connolly was charged with inducing Agent Morris to do the same, in violation of Morris's legal obligations. Among the several racketeering acts charged was that Connolly had told Bulger and Flemmi of Halloran's statements that Bulger and Flemmi had caused Wheeler's murder. In turn, the indictment charged, Bulger caused Halloran to be murdered. Connolly was convicted, and his conviction was affirmed on appeal. *United States v. Connolly*, 341 F.3d 16 (1st Cir.2003).

On May 25, 2000, the estate of John McIntyre, through its administrator (McIntyre's mother, Emily McIntyre) and co-administrator (McIntyre's brother, Christopher McIntyre), filed an administrative claim against the United States under the FTCA.[1] The essence of the theory behind the claim was that the FBI had (i) directly caused the death of John McIntyre, when Agent Connolly informed Bulger and Flemmi that McIntyre was cooperating with certain authorities investigating Bulger and Flemmi, thus signing McIntyre's death warrant, and (ii) indirectly caused McIntyre's death through the protection the FBI afforded Bulger and Flemmi, which encouraged and enabled them to commit murders, including that of McIntyre.[2] A second administrative complaint was filed on June 8, 2000.

On May 11, 2001, the estate of Roger Wheeler, the murdered Tulsa businessman, filed an administrative claim under the FTCA against the United States. The theory of the claim was that the FBI's illicit protection of Bulger and Flemmi had facilitated the murder-of Roger Wheeler.[3] This legal theory differed from that articulated in the McIntyre case, as there was no direct relationship between the FBI and Wheeler.

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[1] We refer to the plaintiff in this case as McIntyre.

[2] Specifically, the estate asserted legal theories of (a) conspiracy to protect Bulger and Flemmi from arrest and prosecution as a proximate cause of McIntyre's kidnapping, torture and execution in violation of McIntyre's First, Fourth, and Fifth Amendment rights; (b) violation of those same Fourth and Fifth Amendment rights, stated as claims under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971); and (c) wrongful death, in violation of Mass. Gen. Laws ch. 229, §§ 2, 6.

[3] Both the Wheeler and McIntyre administrative claims also included claims that FBI agents had obstructed and impeded the investigation of the respective murders. But in their suits in federal court, both sets of plaintiffs raised cover-up claims only against individual FBI agents, not against the United States itself.

The United States failed to act on either claim within the required six-month period, thus giving both estates the option, which they took, of treating those claims as having been denied. *See* 28 U.S.C. § 2675(a). In due course, both filed suit against the United States as well as various FBI agents in the Boston office, Bulger, Flemmi, and other members of the Winter Hill Gang.

McIntyre's claims against the United States consisted of (1) three counts under Mass. Gen. Laws ch. 229, § 2 for civil conspiracy, negligence, and supervisory liability, causing McIntyre's death and (2) three counts under Mass. Gen. Laws ch. 229, § 6, corresponding to the three counts under § 2, for negligently causing McIntyre's conscious suffering while he was kidnapped, tortured and killed.

The claims of the Wheeler estate were joined by Roger Wheeler's widow and four of his five children, suing individually.[4] The Wheelers' claims against the United States sought to hold it directly and vicariously liable for (1) two counts of tortious conduct causing Wheeler's death under Mass. Gen. Laws ch. 229, § 2; (2) two counts of causing Roger Wheeler's conscious suffering the moments immediately before his murder under Mass. Gen. Laws ch. 229, § 6; and (3) one count of causing emotional distress to Wheeler and his family.

The United States moved to dismiss in both suits on the ground that neither set of plaintiffs filed their administrative claims within the required two-year period from the accrual of the cause of action. *See* 28 U.S.C. § 2401(b). The district court agreed in both cases. *McIntyre v. United States*, 254 F.Supp.2d 183, 193 (D.Mass.2003); *Wheeler v. United States*, No. 02-

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[4] We refer to the estate and individual plaintiffs in this case as the Wheelers.

10464-RCL (D.Mass. March 31, 2003). This consolidated appeal is from the dismissals of the FTCA claims against the United States and reviews the single issue, on two sets of facts, of when the claims "accrued" for FTCA purposes. To be timely, the McIntyre claims had to accrue on or after May 25, 1998, and the Wheeler claims on or after May 11, 1999.

I.

The following facts are presented in the light most favorable to the plaintiffs. *See Muniz-Rivera v. United States*, 326 F.3d 8, 11 (1st Cir.2003). The facts are drawn from the two complaints and the materials submitted to the district court on the respective motions to dismiss. *Gonzalez v. United States*, 284 F.3d 281, 288 (1st Cir.2002) (on a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(1), the court may look to supplemental materials in addition to pleadings). We also draw on facts found in *United States v. Salemme*, *supra*.

A. Factual and Procedural Background Relevant to McIntyre

In mid-October 1984, John McIntyre began cooperating with Richard Bergeron of the Quincy Police Department. *Salemme*, 91 F.Supp.2d at 213. McIntyre told Bergeron that he was an engineer on a ship named the Valhalla that had been used in an unsuccessful attempt to deliver guns and ammunition from Massachusetts to the Irish Republican Army (IRA) in Ireland. He said that he worked for Joseph Murray, who secretly owned the Valhalla and was closely connected to Bulger, and that Bulger was involved in the attempted arms shipment through his associates Kevin Weeks and Patrick Nee. McIntyre also mentioned Flemmi. *Id.* Bergeron told Agent Roderick

Kennedy, an FBI liaison officer, that McIntyre was cooperating and that McIntyre had linked Bulger and his associates to the Valhalla. Bergeron arranged for agents from the DEA and United States Customs Service, along with Agent Kennedy, to participate in McIntyre's debriefing. Kennedy and a Customs agent interviewed McIntyre on October 17, 1984. McIntyre told them that Bulger's associate Patrick Nee had traveled to Ireland to meet the Valhalla. *Id.* at 214. McIntyre also told them that Murray was partners in a separate drug smuggling operation with "an individual named Whitey who operates a liquor store in South Boston," whom Kennedy understood to be Bulger. *Id.* Around November 30, 1984, McIntyre disappeared.

Christopher McIntyre, John's brother, stated by affidavit that he and Emily McIntyre, John's mother, filed multiple missing persons reports with the Quincy police. Christopher said that the government told him on one occasion that the "mob" had murdered John, but later told him that John was "alive, a fugitive from justice and would be prosecuted if caught." Emily also stated by affidavit that she had made "repeated requests" to the government for information or help in finding her son but received none. Instead, she said, government agents told her that "John was a fugitive." In a 2000 *Boston Herald* interview, both Emily and Christopher said that they had suspected Bulger's hand in John's disappearance in 1984 but said nothing out of fear.

On April 15, 1986, although McIntyre was still missing, a grand jury indicted him along with Murray, Nee, and four others for their roles in the Valhalla operation and drug smuggling. Bulger and Flemmi were not named as defendants or otherwise mentioned in the indictment. The grand jury returned a superseding indictment on May 8, 1986, which again did not name Bulger or Flemmi as defendants. The

court then issued a warrant for McIntyre's arrest. On September 6, 1995, a note appeared in the docket of the Valhalla prosecution: "Case reopened as to John Crawley, John McIntyre, Michael Nigro. NOTE: Case previously closed in error. Defendants Crawley, McIntyre and Nigro remain fugitives." The case remained open until March 20, 2000, when McIntyre's death had been confirmed.

Meanwhile, on April 16, 1986, shortly after the first indictment, attorney John Loftus, acting on behalf of Emily, Chris, and Patricia McIntyre, John's sister, sent a letter to the Attorney General, United States Customs Service, DEA, State Department, and United States Attorney for the District of Massachusetts. The FBI was not one of the addressees on the letter. The letter, whose subject line was "*Re: Wrongful Death of John L. McIntyre*," alleged that John McIntyre was a government informant concerning IRA gun-running in Boston, that federal authorities leaked his informant status to the British government, and that the British government told the IRA, resulting in McIntyre's abduction and murder.

On June 2, 1986, Emily McIntyre asked the Veterans Administration (VA) to erect a headstone marker for her son at the Massachusetts National Cemetery.

On September 20, 1988, the *Boston Globe* ran a report describing Bulger as an FBI informant and raising the possibility that Bulger "has been able to exploit his cachet with the FBI" to evade investigation and apprehension by the state police and the DEA. The article suggested that the FBI may have tipped Bulger off to recording devices in his home and car and to the timing of sting operations. But it did not raise the possibility that the FBI leaked information to Bulger about informants in his own organization or shielded

him from prosecution for crimes like murder. Nor did the article mention McIntyre. The article reported that

State Police officials ... asked the FBI to conduct an internal inquiry. The FBI cleared two agents, and the FBI leadership remains outraged at the suggestion that any of its own would engage in that kind of treachery.

James F. Ahearn, special agent in charge of the FBI in Boston, was unequivocal when asked last month if Bulger has had relations with the FBI that have left him free of its scrutiny.

"That is absolutely untrue," said Ahearn. "We have not had evidence that would warrant it and if we do develop anything of an evidentiary nature, we will pursue it. We specifically deny that there has been special treatment of this individual." He declined to make any further comment on the matter and instructed Connolly not to speak on the subject.

In 1989, Emily McIntyre and Loftus published *Valhalla's Wake: The IRA, MI6, and the Assassination of a Young American* (Atlantic Monthly Press). In the book, they indicated awareness that John had ties to the IRA and the "Mob" and that he faced possible "Mob[ ] retribution" for his cooperation with the government. They stated that John's blue pickup truck had been spotted at Murray's place of business and that it was later found under a bridge with his uncashed VÃ check inside. But they ultimately theorized that British intelligence was responsible for John's murder. Based on the McIntyre family's own investigation into John's death, which involved interviews with "an IRA courier" and a "source" within British intelligence, the book speculated that British intelligence had its own mole in the Valhalla, discovered from United States Customs agents that

McIntyre was an informant on a related drug-smuggling operation, falsely told the IRA that McIntyre was an informant on the Valhalla operation to divert attention from the British mole, and then murdered McIntyre to prevent him from refuting the story.

In October 1991, Emily McIntyre applied to the VA for death benefits under her son's policy.

In the early to mid-1990s, the *Boston Globe* published a series of articles on McIntyre's disappearance. One of those articles, appearing on December 24, 1992, stated that Sean O'Callaghan, a former IRA operative, had tipped off the Irish police to the 1984 Valhalla shipment and that the IRA may have mistakenly suspected McIntyre of being the leak and murdered him. The story, which quoted Emily McIntyre, said that "[m]ost authorities believe McIntyre was done in by his associates, ... most of whom were in the now-defunct Winter Hill Gang" headed by Bulger. The article noted that when Bulger heard that the Valhalla had been seized, he said, in a conversation secretly recorded by DEA bugs in his apartment, "That's our stuff," and that McIntyre was last seen with Patrick Nee, a Bulger associate. But the story made no connection between the FBI and McIntyre's death. In fact, in response to Emily McIntyre's theory that her son had been killed by British intelligence, the article noted that "federal investigators familiar with the Valhalla case say there is *no evidence that McIntyre was fingered by any agent of the US*, Irish, or British governments" (emphasis added).

On January 29, 1995, a second article in the *Boston Globe* reported that "authorities in the United States" had called "ludicrous" any claim that "the U.S. government negligently allowed [McIntyre] to be killed." The story indicated that government officials were not the only ones who might have known that

McIntyre was an informant, stating that "[r]umors that [John] McIntyre was talking [to the federal government] were rampant" and citing Emily McIntyre as saying that Customs agents had "openly tailed [her son], and were parked outside her home the last night she saw her son."

Then, on December 11, 1996 and June 14, 1997, the *Boston Globe* published two more articles reporting that law enforcement officials believed McIntyre had been killed by the Winter Hill Gang. The December 11 article, which quoted Emily McIntyre, stated that "[f]ederal agents believe McIntyre was killed by Boston gangsters who suspected him of informing against them." The June 14 article was more specific. It theorized that Bulger had compromised the Valhalla operation, after taking a hefty profit from it, by tipping off the Central Intelligence Agency (CIA). Relying on witness statements and other evidence, the article suggested that, afterwards, Bulger and Flemmi nonetheless tortured McIntyre to find out what he had told authorities about the gun-running and marijuana smuggling operations, and then killed him, disposing of his body at sea. Neither article made any mention of FBI involvement.

At around the time of the second article, in 1997, more details of the relationship between Bulger and Flemmi and their FBI handlers came to light through the prosecution of Flemmi in the case of *United States v. Salemme*, 91 F.Supp.2d 141 (D.Mass.1999). In *Salemme*, on January 10, 1995, a grand jury indicted Bulger and Flemmi, along with five others who were members of either La Cosa Nostra or the Winter Hill Gang, of RICO conspiracy and various other federal crimes. *Id.* at 301. Three more superseding indictments were obtained, with the last coming on July 2, 1996. *Id.* at 306. None of the indictments

mentioned McIntyre's disappearance, although several referred to murders committed by Bulger and Flemmi.

In April 1997, in the process of addressing the defendants' motion to suppress some electronic surveillance evidence, Judge Wolf, who was presiding over the *Salemme* case, discovered earlier filings in the case before a magistrate judge that suggested that Bulger and Flemmi were FBI informants. *Id.* at 308. This information raised questions about, inter alia, whether the FBI had given Bulger and Flemmi immunity from prosecution for their ongoing criminal conduct.

In a June 6, 1997 order, over the FBI's objections, Judge Wolf revealed that the FBI had, in response to a court order, confirmed in a closed hearing that Bulger was an informant. *United States v. Salemme*, 978 F.Supp. 364, 365 (D.Mass.1997). The order also revealed that Flemmi was an informant. Id. at 373. In a June 25, 1997 affidavit, Flemmi stated that Agent Morris had assured him that he and Bulger could be involved in any criminal activities *short of murder* and would be protected by the FBI. *Salemme*, 91 F.Supp.2d at 310. Flemmi's affidavit was not sealed and an account of his statements was published the next day in the *Boston Globe*. Several months later, on September 3, 1997, Flemmi submitted under seal a motion to dismiss, claiming, inter alia, that the FBI had promised him immunity. *Id.* at 311. The motion was unsealed, over government objections, on September 10. *Id.*

Several months later, on December 5, 1997, the *Boston Herald* made public that the Department of Justice had conducted its own probe into Bulger and Flemmi's relationship with their handlers. The article reported that Judge Wolf had said at a hearing the previous day that the Office of Professional

Responsibility had launched an internal probe and found "no evidence of continuing criminal conduct within the statute of limitations" by Agents Morris and Connolly. Some details of this investigation were later revealed in Judge Wolf's opinion in *Salemme*, issued on September 15, 1999:

> In late June 1997, the Attorney General established a task force of Department of Justice and FBI personnel to investigate the allegations of misconduct raised by Flemmi and the motions to suppress. That task force conducted its investigation in July and early August 1997, and issued a confidential report to the Attorney General. With the agreement of the government, the court reviewed the Executive Summary of that report and some of the documents that the investigation generated in order to decide certain issues concerning discovery....

91 F.Supp.2d at 310. Nothing in the record indicates that the underlying facts of the Office of Professional Responsibility investigation were otherwise made public at the time. But from our review of the docket in the *Salemme* case, it is clear that the government repeatedly sought, at around this time, to keep Flemmi's allegations of government misconduct and the government's response to them under seal.

Judge Wolf held a series of evidentiary hearings from January to October 1998 on the subject of Flemmi's claim of immunity. *Id.* at 312. These hearings were open to the public. Emily McIntyre attended part of a hearing on April 15, 1998. In an article the next day, the *Boston Herald* reported that at that hearing, Robert Stutman, the former local chief of the DEA, testified that "agents in his office 'swore' that the FBI compromised their Flemmi-Bulger probe to the point where the pair's bureau 'handler' was unwelcome at

DEA's offices." Stutman admitted, however, that he had no proof of FBI wrongdoing and that he "d[id]n't know now" if "the FBI [had] burn[ed] us on [the] investigation." Nothing in the record indicates that Stutman ever mentioned McIntyre in his testimony.

One week later, on April 22, Morris testified, under a grant of immunity, that he had told Connolly in early 1982 that another FBI informant, Brian Halloran, had said that Bulger and Flemmi asked him to murder Roger Wheeler. *Id.* at 209. Morris testified that Connolly told him that he had passed the information on to Bulger and Flemmi. Halloran was murdered shortly thereafter on May 11, 1982. The *Boston Herald* ran a story on April 23 summarizing Morris's testimony. As with Stutman, nothing indicates that Morris ever mentioned McIntyre in his testimony.

On May 20, 1998, another DEA agent, Albert G. Reilly, testified about the Valhalla. The *Boston Globe* summarized Reilly's testimony the next day with the headline "DEA unable to link Bulger to IRA guns." The story recounted that "authorities now believed that *Bulger had tipped off authorities* to the gun-smuggling operation and that he and Flemmi tortured a Quincy man, John McIntyre, who was suspected of cooperating with the authorities" (emphasis added). The story did not say, however, that the FBI had tipped off Bulger as to McIntyre's identity as an informant. The article also stated that Reilly had testified that he, like Stutman, believed the DEA's investigation of Bulger and Flemmi had been compromised by the FBI but had no way to prove it.

In early June 1998, after the May 25, 1998 critical date for accrual of the McIntyre claims had passed, Richard Bergeron of the Quincy Police Department testified about McIntyre's cooperation and disappearance. *Id.* at 213. As best we can tell, Bergeron's testimony was the first piece of evidence

presented in the *Salemme* proceedings that provided direct information about McIntyre's disappearance. Bergeron testified that McIntyre was "petrified" of the people he was implicating and that McIntyre was not the type of potential witness whose cooperation could be publicly disclosed. Bergeron then said that he told FBI Agent Kennedy that McIntyre had implicated Bulger and his associates in the Valhalla operation. He testified that he had arranged for Kennedy and a Customs agent to interview McIntyre. *Id.* at 214. Kennedy had testified earlier, on April 14, 1998, that he and Connolly often exchanged information. Other evidence also indicated that Kennedy had participated in protecting Bulger and Flemmi from investigation on previous occasions. *Id.* But, because the government, apparently in violation of discovery orders, did not produce Kennedy's reports of his interview of McIntyre until after Kennedy had testified, Kennedy was never questioned about whether he had passed on the information about McIntyre to Connolly and, if so, whether Connolly had told Bulger and Flemmi. Kennedy was not recalled to the witness stand to provide this information. *Id.*

During Bergeron's cross-examination, the prosecution asked him what individuals, to his knowledge, knew that McIntyre was cooperating with authorities and might have passed on that information. When defense counsel objected, the prosecution stated that its line of questioning was in response to the implication that "it was the FBI who may have leaked this [information to Bulger and Flemmi] *when there's literally a dozen people*" other than the FBI who could have done so (emphasis added). The prosecution was explicit that the evidence was so speculative that the court "*shouldn't infer that there was some leak from the FBI that led to Mr. McIntyre's disappearance*" (emphasis added). The prosecution then went on to establish that, in addition to the FBI, the Quincy police, the

Customs Service, and the DEA all knew of McIntyre's cooperation. The prosecution also established that McIntyre had spoken to authorities about a number of "notorious criminals," as well as the IRA, "[a]ll of whom would have had a motive to make him disappear."

Judge Wolf published a 260-page opinion in the *Salemme* case on September 15, 1999, well after the cut-off date for accrual of McIntyre's claims. As to McIntyre's disappearance, he concluded,

> [T]here is circumstantial evidence to suggest that Kennedy may have told Connolly about McIntyre's cooperation and claims and, in view [of] the Halloran matter, reason to be concerned that Connolly may have told Bulger and Flemmi. These issues cannot, however, be resolved on the present record.

Id. at 214-15.

McIntyre's body was recovered on January 14, 2000. Kevin Weeks, a Bulger associate, led law enforcement to McIntyre's makeshift grave. *Flemmi*, 195 F.Supp.2d at 251 n. 45.

On May 25, 2000, McIntyre's estate filed a notice of tort claim with the FBI.

On September 27, 2000, a grand jury returned a superseding indictment of Bulger and Flemmi that alleged that in October or November of 1984, Bulger and Flemmi learned that McIntyre was cooperating with the FBI and Customs Service regarding Bulger's involvement in both the Valhalla operation and the importation of marijuana by boat into Boston, and, as a result, kidnapped and murdered McIntyre. The indictment did not say how Bulger and Flemmi

discovered McIntyre's cooperation. On October 11, 2000, Connolly was indicted for his role in various murders committed by Bulger and Flemmi, but not for any role in McIntyre's murder.

On March 8, 2001, McIntyre's estate filed suit in federal district court. McIntyre's claim was the first administrative claim and first federal action to be filed arising from the FBI's relationship with Bulger and Flemmi. On October 15, 2001, the United States moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) on the ground that McIntyre's estate had failed to present its administrative claims within two years of accrual, as required by the FTCA, 28 U.S.C. § 2401(b).

On March 31, 2002, the district court granted the motion, finding that the claims had accrued before April 1998. The court reasoned that, prior to April 1998, the McIntyres clearly believed John McIntyre to be dead and had sufficient facts to support a reasonable inference that Bulger and Flemmi had killed him, based on local press reports that McIntyre was last seen with Nee, a Bulger associate, and that Bulger ran the Valhalla operation. The court also determined that the McIntyres had enough information to form the theory that "the FBI was at least negligent in [its] handling of Bulger and Flemmi." The court relied principally on (1) the FBI's acknowledgment in 1997 that Bulger and Flemmi were informants and (2) the April 15, 1998 hearing, attended in part by Emily McIntyre, in which DEA Agent Stutman testified about his suspicions that the FBI had compromised a DEA investigation of Bulger and Flemmi. Final judgment was entered on motion of McIntyre's estate. The estate timely appealed.

B. Factual and Procedural Background Relevant to Wheeler

Roger Wheeler, a Tulsa businessman, owned World Jai Alai (WJA), which operated facilities where spectators could bet on Jai Alai matches. *Salemme*, 91 F.Supp.2d at 208. John Callahan, who had ties to the Winter Hill Gang, was president of WJA. *Id.* Wheeler suspected that Callahan was skimming money from WJA for members of the Winter Hill Gang, including Bulger and Flemmi. Wheeler fired Callahan and began an audit of WJA's financial operations. *Id.* at 209. Before the audit was completed, on May 27, 1981, Wheeler was shot to death while sitting in his car in the parking lot of a Tulsa country club. *Id.* at 207-08.

The Wheeler murder remained unsolved for many years. In the spring of 1995, David and Lawrence Wheeler, two sons of Roger Wheeler, visited the FBI's office in Tulsa to deliver some of their father's records requested by the office. They stated that they were unhappy with the lack of progress in the investigation. According to David Wheeler's affidavit, FBI Agent Jack Hawkins replied, "[I]f we do that, we will have to go wherever the evidence might lead us ... and you know, it might actually take us to some involvement on the part of your mother. Are you willing to see your mother go to jail?" David Wheeler interpreted this as a threat intended to deter future complaints about the FBI's lack of progress.

The *Tulsa World* and the *Daily Oklahoman* published at least twelve articles on Wheeler's murder between 1995 and 1999. At the time, Patricia (Wheeler's widow), Pamela (Wheeler's daughter), and Lawrence (one of Wheeler's sons) were living in Tulsa. David, along with another of Wheeler's sons, Mark, was living in Texas. Patricia and David stated by affidavit that they recalled reading some of the Oklahoma press

coverage. Lawrence and Mark recalled reading one or two articles, and Pamela said she did not read any of them.

On January 19, 1995, the *Tulsa World* published a story stating that Brian Halloran had told the FBI that John Callahan offered him a contract to kill Wheeler, but that Halloran refused the offer. The article noted that Halloran was murdered shortly thereafter in 1982. On July 11, 1997, as proceedings in the Salemme trial were developing, the *Tulsa World* reported that Bulger and Flemmi were "potential suspects" in Wheeler's murder and that Flemmi had executed an affidavit stating that he and Bulger were informants and "were given free reign from an FBI supervisor to commit any crime as long as they did not 'clip anyone.' " On November 9, 1997, a Tulsa television station reported that the Wheeler investigation "ha[d] been held up by the FBI's attempts to bring down the Mafia in Boston" and that "the FBI did not share information it had about the death of Roger Wheeler Senior." The next day, the *Tulsa World* reported that "[i]nvestigators said that the prime suspects in Wheeler's killing turned out to be two highly placed mob informants, working with the Boston FBI" and that the "Boston FBI protected their informants, James 'Whitey' Bulger and Steven [sic] 'The Rifleman' Flemmi."

On May 10, 1998, David Wheeler was interviewed by Ed Bradley on CBS's "60 Minutes" program. The following exchange was televised:

> Bradley: David Wheeler, Roger Wheeler's son, says he had trouble understanding why his father's murder had remained unsolved for so long. Until he found out Bulger and Flemmi were FBI informants.

> Wheeler: We've discovered that all along the FBI has been in bed with the prime suspects in my father's murder.
>
> Bradley: So you believe that the FBI protected your father's killers and tried to prevent the truth from coming out?
>
> Wheeler: They not only protected my father's killers, they to this day are protecting my father's killers and they are to this day withholding information from the police. This is eighteen years of covering up the crime. This is eighteen years of being an accessory to murder.

At the close of the segment, David Wheeler also said, "In the end, there's one group, one group of people, that were supposed to help us, and that was the FBI, and those are the very people that betrayed us, those are the very people that continue to betray us to this day."

During the segment, Bradley said that the "extraordinary relationship between the FBI and two organized crime bosses," namely Bulger and Flemmi, "may have allowed the FBI informants to get away with murder." The segment also contained an interview of Homicide Sergeant Michael Huff of the Tulsa police department, who said that the Boston FBI had failed to share Halloran's information with local and federal investigators in Tulsa working on the Wheeler investigation and that this failure constituted "obstruction of justice." Bradley also interviewed five detectives from Oklahoma, Florida, and Connecticut. He stated that these detectives believed the Wheeler murder remained unsolved "because Bulger and Flemmi were protected by the FBI while they were providing information on the Italian Mafia in New England." One detective, David Green, said that the

FBI gave Bulger and Flemmi a "license to steal" and that "apparently that license got a little broader and covered a homicide."

David Wheeler said, by affidavit, that when he accused the FBI of a cover-up on "60 Minutes," he meant only that he had previously been unaware of Bulger and Flemmi's status as informants and that he "felt as though the FBI should have shared this information with [him] ... long before this time." He said that he did not believe at that time that the FBI was responsible in any way for his father's death and that he had no facts to support such a belief.

Patricia and Lawrence said by affidavit that they saw David on "60 Minutes." Pamela and Mark said, also by affidavit, they did not see David on "60 Minutes" and did not discuss the show with David or anyone else. Mark said that he was aware that David appeared on the show, but Pamela said that she could not remember if she had been aware of that fact at the time. The Wheelers said in their respective affidavits that tensions had arisen in the family since Roger's murder and that they communicated very little among themselves, particularly concerning the painful subject of the murder.

Following the "60 Minutes" interview, David Wheeler also gave interviews to the Boston press. On May 12, 1998, *The Boston Herald* reported that David Wheeler said that he "has always believed that [former FBI Agent Paul] Rico facilitated his father's delivery into oblivion" but that he only recently "discovered that oblivion may well have had names like Whitey and Stevey." The article noted that David Wheeler said his father thought Rico might be trying to kill him. The article described Rico as Flemmi's "FBI mentor" and noted that Rico had recruited Flemmi as an informant. On July 22, 1998, the *Boston Globe* interviewed David

Wheeler and described him as "now believ[ing] the FBI has obstructed the investigation into his father's murder." The article also summarized the testimony of John Morris at the *Salemme* hearings in April 1998, noting that Morris had testified that he told Connolly that Halloran had implicated Bulger and Flemmi in the Wheeler murder investigation and that Connolly may have passed this information on to Bulger and Flemmi. On September 29, 1998, the *Boston Globe* reported John Martorano, a member of the Winter Hill gang, was negotiating a plea agreement with federal prosecutors. Describing David Wheeler as "the son of one of Martorano's alleged victims," the article quoted him as stating that he would approve of a plea agreement for Martorano because "[t]he people he's giving up are the people who have enjoyed the protection of the FBI for many years while committing heinous crimes."

By affidavit, David Wheeler said that he had "probably" read these articles, but Patricia, Pamela, and Lawrence said that they had not, and Mark said that he did not recall whether he read them.

At around the same time, in the summer of 1998, there was Tulsa press coverage of developments in the Wheeler murder. On May 17, 1998, the *Tulsa World* published an article with the headline: "When G-men, Mobsters Are Friends/FBI Ignored Tip-Off on Tulsa Murder." The article summarized Morris's testimony in April 1998, reporting that Morris had admitted to receiving cash and gifts from Bulger and Flemmi, and to working with other agents to "shield[ ] Bulger and Flemmi from prosecution for 20 years because they were the most prized secret FBI informants in New England history." A summary of Morris's testimony was again reported in a July 20, 1998 *Tulsa World* article about the Wheeler murder. The article also reported that John Martorano had agreed to cooperate

with federal prosecutors and to testify against Bulger and Flemmi in the Wheeler murder case.

On September 9, 1999, after the Wheelers' May 11, 1999 cut-off date for accrual had passed, Judge Wolf unsealed John Martorano's plea agreement, in which Martorano admitted that he had murdered Roger Wheeler. Judge Wolf's September 15, 1999 decision in *Salemme* described a series of specific incidents in the early 1980s, before Wheeler's murder, in which FBI agents shielded Bulger and Flemmi from investigation. 91 F.Supp.2d at 202-06. As to Wheeler's murder, Judge Wolf found that partly because of irregularities in the FBI's handling of the files relating to Wheeler's murder, "questions remain regarding the role, if any, played by Flemmi and Bulger in the Wheeler, Halloran, and Callahan murders, and the full degree to which the FBI in Boston has, from 1981 until recently, attempted to keep any such role from being discerned and demonstrated." *Id.* at 213. He noted that a pattern of false statements in Flemmi's informant file diverted attention from Flemmi's crimes and FBI misconduct, that reports containing Halloran's allegations against Bulger and Flemmi were not indexed according to usual FBI policy and hence could not be discovered through a standard search of FBI indices, and that the FBI had disobeyed discovery orders by its late disclosure of relevant documents. *Id.* at 154 n. 3.

On December 22, 1999, John Connolly was indicted for racketeering. A superseding indictment was returned on October 11, 2000. It charged that Connolly had alerted Bulger and Flemmi to the identity of confidential law enforcement informants, tipped them off to various law enforcement initiatives, and failed to report information relating to them that was material to the investigation of criminal activity in the Boston area. It also charged that Connolly had

obstructed a grand jury investigation into Wheeler's murder and tipped Bulger and Flemmi to Halloran's cooperation.

On September 27, 2000, a federal grand jury returned an indictment charging Bulger and Flemmi with racketeering; two of the predicate acts for the racketeering charge were the murder of Roger Wheeler and the conspiracy to commit that murder.

The Wheelers filed a notice of tort claim with the FBI on May 11, 2001. After the FBI failed to respond, the Wheelers filed suit in federal court on March 14, 2002. As in the McIntyre case, the United States moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(1) on the ground that the Wheelers had failed to present their administrative claims within two years of accrual, as required by the FTCA, 28 U.S.C. § 2401(b). On March 31, 2003, the district court granted the motion, finding that the Wheelers' claim accrued no later than May 10, 1998, when David Wheeler appeared on "60 Minutes." The court reasoned that David Wheeler's statements showed that he knew that Bulger and Flemmi were suspected in his father's murder and that they may have escaped investigation and prosecution for the crime with the assistance of the FBI. The court then went on to say that "[i]t does not matter that not all the plaintiffs in this case were as informed as David Wheeler" because they were in possession of sufficient facts to place them on inquiry notice. Final judgment was entered on motion of the Wheelers, who then timely appealed.

II.

A. The FTCA Accrual Standard

The FTCA provides, in relevant part, that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues." 28 U.S.C. § 2401(b). Because the FTCA is a waiver of sovereign immunity, it is strictly construed. *Skwira v. United States*, 344 F.3d 64, 73 (1st Cir.2003).

Normally, a tort claim accrues at the time of injury. *Gonzalez*, 284 F.3d at 288. In *United States v. Kubrick*, 444 U.S. 111, 100 S.Ct. 352, 62 L.Ed.2d 259 (1979), the Supreme Court created a "discovery rule" exception for FTCA claims involving medical malpractice. The Court held that such claims accrue when a plaintiff knows of both the existence and the cause of his injury. *See id.* at 119-202, 100 S.Ct. 352. The Court determined that accrual does not await the point at which a plaintiff also knows that the acts inflicting the injury may constitute medical malpractice. *Id.* at 122, 100 S.Ct. 352. Distinguishing between ignorance of the facts (of injury or its cause) and ignorance of legal rights, the Court reasoned that a claimant, once armed with knowledge of the fact of injury and the identity of the parties that caused the injury, is no longer at the mercy of the government. At that point, claimants can go to others, such as doctors or lawyers, who will tell them if they are victims of malpractice. *Id.* The same is not necessarily true of plaintiffs who are ignorant of the facts, particularly when the government may be in possession or control of the necessary information.

This court has extended this discovery rule to FTCA claims outside the medical malpractice context.

Skwira, 344 F.3d at 74; *Attallah v. United States*, 955 F.2d 776, 780 (1st Cir.1992). Most circuits also apply a discovery rule to wrongful death actions. See *Skwira*, 344 F.3d at 74 (collecting cases).

[1] [2] Under the discovery rule, "a claim accrues when the plaintiff discovers, or in the exercise of reasonable diligence should have discovered, the factual basis for the cause of action." *Gonzalez*, 284 F.3d at 288. The test for whether a plaintiff should have discovered necessary facts is an objective one. *Id.* at 288-89. We look first to whether sufficient facts were available to provoke a reasonable person in the plaintiff's circumstances to inquire or investigate further. "A claim does not accrue when a person has a mere hunch, hint, suspicion, or rumor of a claim, but such suspicions do give rise to a *duty to inquire* into the possible existence of a claim in the exercise of due diligence." *Kronisch v. United States*, 150 F.3d 112, 121 (2d Cir.1998) (citation omitted and emphasis added). Once a duty to inquire is established, the plaintiff is charged with the knowledge of what he or she would have uncovered through a reasonably diligent investigation. *Skwira*, 344 F.3d at 77. The next question is whether the plaintiff, if armed with the results of that investigation, would know enough to permit a reasonable person to believe that she had been injured and that there is a causal connection between the government and her injury. *Id.* at 78. Definitive knowledge is not necessary. *Id.* This inquiry is highly fact- and case-specific, as are the pertinent questions to ask.

In *Attallah*, for example, the plaintiffs learned in September 1982 that the decomposed body of their courier, who had been transporting almost $700,000 of their money to Puerto Rico, had been found. 955 F.2d at 778. Over four years later, two Customs agents were indicted for the robbery and murder of the

courier. *Id.* The court found that the plaintiffs had filed a timely administrative claim against the United States because their claim accrued when the Customs agents were indicted, not when the courier's body was found. *Id.* at 780. The court focused on the fact that aside from the indictment, the only information that the plaintiffs had available about the whereabouts of their courier was a Customs Service document showing that their courier had been processed at the airport customs office and then left the premises. *Id.* The court reasoned that if it took the police until 1987 to discover sufficient information to bring charges against the Customs agents, the plaintiffs could not be expected to be more efficient. *Id.*

Another example is the *Skwira* case, in which a divided court, in three opinions, found that the plaintiffs had failed to file a timely administrative claim. *Skwira*, 344 F.3d at 83-86. There, the claim was that a VA nurse had murdered Edward Skwira, a patient at the Northampton VA hospital, by injecting him with the stimulant epinephrine. The facts convincing to the majority on the issue of accrual were as follows. Skwira was admitted to a substance abuse treatment facility in Worcester, Massachusetts, in early February 1996 for the treatment of chronic alcoholism and on February 15 was transferred to Ward C of the VA hospital, where the murderess was working. *Id.* at 69. Despite the absence of any reason to anticipate heart problems, he suffered a catastrophic cardiac event later that day and died on February 18, with heart ailments listed as the immediate cause of death. *Id.* By the summer of 1996, articles began appearing in the Northampton local press describing an ongoing criminal investigation into the high number of suspicious deaths in Ward C, and the administrator was quoted as not ruling out foul play. *Id.* at 68, 80. By September or October of 1996, investigators contacted the families of some of the

victims, including Skwira's, to voice the government's "suspicions" about the deaths and obtained permission to exhume and autopsy the bodies. *Id.* at 68. Skwira's autopsy showed that the death certificate had misstated the cause of death. *Id.* As the concurring opinion stated, at that point "a reasonable person would have believed that some kind of negligence or misconduct by government employees at the hospital might well underlie Edward Skwira's death." *Id.* at 85 (Boudin, C.J., concurring). Had the plaintiffs sought out independent legal and medical advice at that point, they should have been able to determine in the two-year period whether to file an administrative claim. *See Skwira*, 344 F.3d at 81. The court observed that two other victims' families did file timely claims, whereas the Skwiras waited three years after the autopsy report before filing. *Id.* at 82 n. 19.

Skwira is instructive in the ways in which it is both like and unlike the two cases at bar. The differences are obvious. Unlike the victims in the cases at bar, Skwira was in the sole custody and care of a government hospital and, overwhelmingly, the most likely malefactor was one of a very limited group of government employees at that hospital. All of the deaths occurred in the same place with the same small cast of characters. *See United States v. Gilbert*, 229 F.3d 15, 18 (1st Cir.2000) (the deaths in Ward C of the VA hospital occurred over a six-month period). There was also certainty the patients were dead, unlike in McIntyre's situation.

The chief similarity between the two cases at bar and *Skwira* is that there was a government investigation into possible wrongdoing in all three cases. But the circumstances of the investigation here were different than in *Skwira*. There, the government came to the family with its suspicions of wrongdoing at the hospital and explained the factual basis for those

suspicions. 344 F.3d at 68. The government then helped develop the evidence of wrongdoing, informing the family that the cause of death reported was different than that found in Skwira's autopsy. *Id.* By contrast, in the two cases at bar, the government did not inform the plaintiffs of any investigation, appears to have held the facts revealed in its investigation confidential, and ultimately claimed to have cleared its agents of wrongdoing before the critical dates for accrual purposes.[5]

B. Application to McIntyre's Claims

[3] The claims made by the estate of McIntyre are based on two interrelated theories of how the FBI caused McIntyre's death: (1) by leaking his confidential informant status to Bulger and Flemmi, in violation of a special duty of non-disclosure owed to him by the government, and (2) by protecting Bulger and Flemmi from investigation and prosecution, thus enabling and emboldening them to murder him. As we understand the second theory, it is meant to buttress the first theory; it is perhaps also meant to serve as an independent basis for liability.[6] The first theory, which we understand to be the predominant one, arises out of a special duty that the government has to confidential informants who would be endangered if their informant status were revealed to others, particularly those whose activities are the subject of the informant's disclosures. The FBI Manual requires agents to exercise constant care to ensure that an

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[5] The plaintiffs here do not argue that the pendency of a government investigation should automatically toll accrual of their claims. That argument was rejected in *Skwira*, which found no statutory basis for such tolling. *See* 344 F.3d at 85-86 (Boudin, C.J., concurring).

[6] To the extent that the plaintiff does intend the second theory as an independent basis for liability, the United States is free to challenge the availability of that theory on remand.

informant's identity is not disclosed, whether intentionally or inadvertently. *Salemme*, 91 F.Supp.2d at 150; *see also Leonhard v. United States*, 633 F.2d 599, 614 (2d Cir.1980) ("The procurement of testimony against alleged members of organized crime will normally require appropriate protection of both the informant and his family."); *Socialist Workers Party v. Attorney Gen. of United States*, 458 F.Supp. 895, 907 (S.D.N.Y.1978) ("[T]he FBI asserted that it owed the duty of confidentiality to the informants to protect them from embarrassment and harm."), vacated on other grounds, *In re Attorney Gen. of United States*, 596 F.2d 58 (2d Cir.1979). Because we find that the plaintiff could not reasonably be expected to have discovered the facts supporting the first theory until after May 25, 1998, we find that the case was not properly dismissed and therefore reverse.

The plaintiff's predominant theory depends on the following reasoning:

> 1. McIntyre was cooperating with the government in its investigation of Bulger and Flemmi, which imposed a duty on the FBI;
>
> 2. McIntyre was murdered;
>
> 3. Bulger and Flemmi were responsible for the murder;
>
> 4. McIntyre was murdered because Bulger and Flemmi learned he was informing on them to government authorities;
>
> 5. It was agents of the FBI, Connolly and/or Morris, who told Bulger and Flemmi that McIntyre was cooperating with the FBI.

The district court focused on the first three parts of this sequence only. This did not go far enough. The key missing links are the fourth and fifth points. We focus on the fifth: whether a reasonable person in the McIntyres' position, after conducting a diligent investigation, would have uncovered a sufficient factual basis to believe, before May 25, 1998, that the FBI was the source of the leak to Bulger and Flemmi. We conclude that he or she would not have.

Certainly before May of 1998, the McIntyre family knew of facts that would permit a reasonable person to believe that Bulger and Flemmi were responsible for the killing of John McIntyre in 1984 and that Bulger and Flemmi were FBI informants. In our view, that was not enough to trigger accrual, in light of the nature of McIntyre's claims.

A June 1997 *Boston Globe* article, described in our review of the facts, reported that witness statements and other evidence supported the conclusion that Bulger and Flemmi had McIntyre kidnapped, tortured him to find out what he had told the authorities, and then murdered him. Implicit in this report was that Bulger and Flemmi had somehow found out McIntyre was an informant. But the article never even mentioned the possibility that the FBI had disclosed this information to Bulger and Flemmi or had otherwise given its imprimatur to the murder.

Furthermore, the McIntyres were also faced with the government's affirmative denials of any wrongdoing in the relationship between Bulger and Flemmi and FBI agents Morris and Connolly. The government repeatedly denied wrongdoing in *Boston Globe* articles from 1988 through 1995, and one article reported that an internal FBI investigation had cleared the two agents. Then, a December 5, 1997 *Boston Herald* article stated that the Department of Justice's Office of

Professional Responsibility had investigated and "cleared the FBI handlers [Morris and Connolly] of [wrongdoing involving] informant gangsters Whitey Bulger and Stephen Flemmi." Faced with a denial of wrongdoing by the FBI itself, and lacking any basis to controvert the denial other than rumor, the McIntyres did not have a reasoned basis to believe that it was the FBI that had leaked McIntyre's identity as an informant to Bulger and Flemmi.

We turn to the question whether there was later information between the December 5, 1997 denial of wrongdoing by the FBI and May 25, 1998 that provided notice of that missing link. The district court found such an event based on testimony by Agent Stutman, the former local chief of the DEA, in the *Salemme* hearings on April 15, 1998. Because Emily McIntyre attended part of those hearings, the court attributed to her knowledge of Stutman's statements that he and agents in his office suspected that the FBI had compromised their investigation of Bulger and Flemmi but had no facts to confirm their suspicions. Even assuming that statement provided a reasoned basis to believe that the FBI had compromised the DEA's investigation, perhaps by tipping Bulger and Flemmi to listening devices or warning them of raids, it does not provide a reasoned basis to believe that the FBI leaked McIntyre's informant status to Bulger and Flemmi.

The government points to a different event: an April 23, 1998 *Boston Herald* story reporting that the previous day, Morris had testified that in 1982, he told Connolly, who in turn told Bulger and Flemmi, the identity of FBI informant Brian Halloran, who had informed authorities that Bulger and Flemmi tried to hire him to kill Roger Wheeler. The government argues that this information-that the FBI had leaked to Bulger and Flemmi the identity of a different

informant, as to a different crime, at a different time-provided sufficient facts for a reasonable person to believe that the same thing had happened to McIntyre. The government argues that if there was evidence Bulger and Flemmi killed Halloran because the FBI told them Halloran was an informant, then a reasonable person could have inferred that Bulger and Flemmi also killed John McIntyre based on a similar FBI leak. The government's analogy overreaches both as a matter of logic and as a matter of fact.

Even assuming arguendo that the *Boston Herald* article was enough to lead the McIntyres to *suspect* that the FBI leaked McIntyre's identity, and thus to trigger a *duty to inquire*, a reasonably diligent investigation would still not have revealed the necessary factual predicate for their claim before the accrual date. Most avenues of investigation were cut off by the possibility of criminal liability for any FBI agents and others involved. Attempts to gain information through depositions would likely have been thwarted by invocations of the Fifth Amendment privilege against self-incrimination. And other information-such as testimony before the grand jury or facts discovered in the government investigation-was hidden behind a veil of secrecy. In this sense, the McIntyres had even less access to critical information than most FTCA plaintiffs. *See Kubrick*, 444 U.S. at 122, 100 S.Ct. 352 (adopting a discovery rule in part because "the facts about causation may be in the control of the putative defendant, unavailable to the plaintiff or at least very difficult to obtain").

Without more specific information than provided in the *Boston Herald* article, a reasonable person could not have had a basis to claim that the FBI betrayed McIntyre's cooperation to Bulger and Flemmi. Bulger and Flemmi apparently murdered people for many reasons. Some of those people were informants. But,

without more, one cannot reasonably deduce from a victim's informant status (1) that Bulger and Flemmi knew the victim to be an informant, (2) that, if Bulger and Flemmi knew the victim to be an informant, they murdered the victim for that reason, and (3) most importantly, that even if Bulger and Flemmi murdered the victim for being an informant, the source of their information as to the victim's informant status was the FBI. One could not reasonably infer, for purposes of FTCA accrual, from Morris's testimony about Halloran that the FBI told Bulger and Flemmi about every informant in their organization or that Bulger and Flemmi killed every person that they knew to be informing against them, regardless of the circumstances.

Drawing a direct parallel between the murders of Halloran and McIntyre is particularly difficult because the situations were so different. The cases involved different and unrelated underlying crimes that took place at different times and in different places: the Wheeler murder was in 1981 in Oklahoma and was related to control of a Jai Alai empire, whereas the Valhalla gun-running operation was in 1984 in Boston for the IRA. Moreover, Halloran arguably posed a greater threat to Bulger and Flemmi as an informant than McIntyre did. As Bergeron noted, and as Bulger and Flemmi might well have been aware, McIntyre was "petrified" of the two and was unlikely to come forward publicly or, by implication, to testify. McIntyre was a low-level operative in a gun-running operation, whereas Halloran was a hit man with the power to implicate Bulger and Flemmi for murder. Another factual difference is that there was some indication, as the prosecution itself argued in *Salemme*, that McIntyre's cooperation was known to those outside the government, and thus that Bulger and Flemmi could have discovered this information from some source other than the FBI. A January 29, 1995 *Boston*

Globe article reported that "[r]umors that McIntyre was talking [to the federal government] were rampant" at the time.

The government's own behavior further undercuts its argument here that there were sufficient facts before May 25, 1998 to reasonably infer that FBI had betrayed McIntyre. In response to a defense objection during the cross-examination of Bergeron in the *Salemme* hearings on June 4, 1998, the prosecution said that "there's literally a dozen people" outside the FBI who knew of McIntyre's cooperation and could have passed the information to Bulger and Flemmi. The prosecutor argued that Judge Wolf "shouldn't infer that there was some leak from the FBI that led to Mr. McIntyre's disappearance" because the evidence was too speculative. That, of course, is directly contrary to the position of the United States as stated in the case at bar: that before May of 1998, the McIntyres not only should have drawn exactly that inference but should have acted on it by seeking legal and other expert advice about filing an FTCA claim.

In the June 1998 *Salemme* hearings, after the critical date for accrual purposes had passed, the prosecution also sought to establish in its questioning of Bergeron that McIntyre had spoken to authorities about a number of notorious individuals, as well as the IRA, "[a]ll of whom would have had a motive to make him disappear." This casts further doubt on whether Bulger or Flemmi had caused McIntyre's disappearance, making even more remote the inference that the FBI had leaked McIntyre's identity as an informant and caused his murder.

This government position in June of 1998 is significant for several reasons. It shows that there was a real basis to question whether it was *at all* reasonable to infer that Connolly had disclosed

McIntyre's dual role to Bulger. We have no reason to think the federal prosecutor's position in *Salemme* was taken in bad faith. The prosecution, which had access to confidential information and was in possession of far more facts than members of the public, argued to the court that it could not reasonably make such an inference. The McIntyres, who were in a far worse position to access or evaluate information, should not be required here to draw such an inference. *See Attallah*, 955 F.2d at 780 ("The police did not have sufficient information to bring charges against the [relevant government officials] until 1987. We believe [plaintiffs] could not have been more efficient.").

Equally importantly, the prosecutor's position in June of 1998 was yet another expression by the United States in a public forum that Connolly had not leaked McIntyre's identity and no wrongdoing had occurred.

Our decision in *Skwira* hurts rather than helps the government's position. The United States in Skwira told the plaintiff that there was cause to investigate suspicious deaths of patients who were within the sole custody of a VA hospital when they died and did not deny wrongdoing. 344 F.3d at 80. Here, the government kept confidential its investigation of claims of misconduct by Connolly and Morris and ultimately reported in 1997 that it found no wrongdoing. Even Judge Wolf had great difficulty in prying loose coherent information about McIntyre's death by the date of his opinion on September 15, 1999. Judge Wolf commented that the question of whether the FBI disclosed McIntyre's identity could not "be resolved on the present record" because of the government's delayed disclosure of documents and its desire to avoid bringing to light the circumstances surrounding McIntyre's death. *Salemme*, 91 F.Supp.2d at 215.

We reverse the dismissal of the claims by McIntyre's estate and remand.

C. Application to the Wheeler Case

The cut-off date for the accrual of the Wheelers' claim, filed on May 11, 2001, is May 11, 1999. The district court concluded that their claim accrued on or before May 10, 1998 when David Wheeler appeared on "60 Minutes."

[4] The Wheeler case is based on a fundamentally different legal theory than the McIntyre case. Unlike the McIntyre case, which is based on duties arising from the government/informant relationship, the Wheelers' claim is not based on any direct relationship between Roger Wheeler and the FBI. The theory of liability is, as a result, much more indirect than that in the McIntyre case.

The Wheelers have styled their Mass. Gen. Laws. ch. 229, §§ 2 and 6 wrongful death claims against the United States as based on both direct and vicarious liability. They assert that the United States is vicariously liable for the actions of Connolly, Morris, and other agents, which provided Bulger and Flemmi with a "protective shield" against prosecution and investigation that gave the two criminals the opportunity to commit crimes and emboldened them to do so, proximately causing Wheeler's murder. The Wheelers also assert that the United States is directly liable for failing to prevent Wheeler's murder, in light of the foreseeable risk that Bulger and Flemmi would continue to engage in violent criminal activity. In addition, the Wheelers assert a generalized count against the United States for intentional infliction of emotional distress based on Wheeler's murder.

For the Wheelers' claims to accrue, there had to be facts available that would permit a reasonable person to conclude (1) that Bulger and Flemmi were instrumental in the murder of Roger Wheeler; (2) that Bulger and Flemmi were informants for the FBI; and (3) that the FBI had a special relationship with Bulger and Flemmi that protected and encouraged them in their criminal activity, including Wheeler's murder.

The Wheelers clearly had sufficient notice of the first two sets of facts before the May 11, 1999 accrual date. On April 22, 1998, Morris testified that Bulger and Flemmi were valuable FBI informants and that he was afraid he had sent Halloran to his death by telling Connolly that Halloran was alleging that Bulger and Flemmi had tried to hire him to kill Wheeler. Morris's testimony on this point received national press attention. It was summarized in two *Tulsa World* articles on May 17, 1998 and July 20, 1998 and in a July 22, 1998 *Boston Globe* article that quoted David Wheeler. In addition, a July 20, 1998 *Tulsa World* article and a September 29, 1998 *Boston Globe* article, which quoted David Wheeler, both reported that John Martorano was negotiating a plea agreement with federal prosecutors and had implicated Bulger and Flemmi in the Wheeler murder. In addition, as the district court fairly pointed out, David Wheeler stated on the May 10, 1998 "60 Minutes" show that Bulger and Flemmi had caused his father to be murdered, that the two were FBI informants, and that the FBI was "in bed" with the two.

What proves fatal to the Wheelers' claim is that they were also on notice of the third set of facts. We sidestep the dispute about whether David Wheeler meant his statements on "60 Minutes" to indicate that the FBI had protected Bulger and Flemmi from prosecution and thus enabled and emboldened them to murder his father. Other statements on the "60

Minutes" show should have made clear the special relationship between the FBI and Bulger and Flemmi. Ed Bradley reported that the "extraordinary relationship" between the FBI and Bulger and Flemmi "may have allowed [them] to get away with murder." A detective interviewed for the segment was even more explicit, describing Bulger and Flemmi as having a "license" from the FBI to commit crimes that "covered a homicide."

In addition, separate from the "60 Minutes" show, there was national and local news coverage before the critical date describing the FBI's shielding of Bulger and Flemmi from prosecution. At least some of those articles should have caught the Wheelers' attention, because they specifically referenced Roger Wheeler's murder and even, in several instances, quoted David Wheeler.

Two *Tulsa World* articles on July 11, 1997 and January 9, 1998, both of which specifically mentioned the Wheeler murder, reported that Flemmi was claiming in the *Salemme* proceedings that the FBI gave him and Bulger immunity from prosecution for their ongoing criminal activities in exchange for information about organized crime activities. The July 11 article specifically noted that Flemmi had executed an affidavit stating that he and Bulger had been given "free reign from an FBI supervisor to commit any crime" short of murder. On May 10, 1998, the same night that the "60 Minutes" segment ran, a local Tulsa news station, KOTV, reported that the FBI had tipped Bulger and Flemmi to Halloran's cooperation in the Wheeler murder investigation and that Boston FBI agents may have taken bribes from Bulger and Flemmi.

In the summer of 1998, two *Tulsa World* articles and one *Boston Globe* article that quoted David Wheeler

reported that Morris admitted that the FBI had shielded Bulger and Flemmi from prosecution for twenty years because they were prized informants. The *Tulsa World* article was entitled "When G-men, Mobsters Are Friends/FBI Ignored Tip-Off on Tulsa Murder." All three articles specifically mentioned the Wheeler murder. Morris's testimony was also picked up by the national press, with coverage in May and June of 1998 from the Associated Press, the *Salt Lake Tribune*, the *Charleston Gazette & Daily Mail*, the *L.A. Times*, and the *Seattle Times*.

In the summer and fall of 1998, following the "60 Minutes" segment, David Wheeler himself drew the connection between his father's murder and the FBI's special relationship with Bulger and Flemmi in his comments to the Boston press. In a May 12, 1998 article headlined "Dad's execution mystery no more to anxious son," the *Boston Herald* described David Wheeler as saying in an interview that he "always believed" that former FBI agent Paul Rico "facilitated" his father's murder at the hands of Bulger and Flemmi. Wheeler also told the *Boston Globe* on September 29, 1998 that John Martorano's cooperation would expose "people who have enjoyed the protection of the FBI for many years while committing heinous crimes."

The Oklahoma press and television coverage, the information revealed on "60 Minutes," and David Wheeler's interviews with the Boston press are sufficient to establish that *David Wheeler* was clearly on notice before the May 11, 1999 critical date.

The issue is whether the other family members, in their different positions, could reasonably be expected to be aware of this information. The district court focused on David Wheeler and attributed his knowledge to all. We disagree with that methodology:

the "knew or reasonably should have known" question must be asked individually, as to the information available to someone in each plaintiff's situation. There is a difference between "knew" and "should have known." A plaintiff could, at least in theory, have actual knowledge of critical facts even though he or she would not otherwise be reasonably expected to know them. As to whether a plaintiff "reasonably should have known" critical facts, the inquiry is an objective one: whether a reasonable person *similarly situated* to the plaintiff would have known the necessary facts. *See Skwira*, 344 F.3d at 80 (the "degree of knowledge of injury and cause that would prompt a reasonable person to take ... protective steps will vary with the circumstances of the case"); *cf. Rodriguez Narvaez v. Nazario*, 895 F.2d 38, 41 n. 5 (1st Cir.1990) (describing a similar constructive knowledge test, used to determine accrual of federal civil rights claims, as whether "a reasonably prudent person similarly situated" should have known the necessary facts).

Where there are several plaintiffs and they do not live in the same geographical area, and public notice of the underlying facts is restricted to certain areas, geography is a factor to be considered. Geography may be particularly relevant where, as here, notice is based on local television and press coverage. Similarly, where, as here, some members of the family have actual notice but others do not, the issue of how strong the family's ties are and how frequently they communicate can be relevant. A plaintiff who is estranged from other more knowledgeable family members is differently situated than one who speaks with his or her family every day.

Despite this leeway, the record here establishes that each of the Wheelers had available sufficient facts to raise suspicions provoking a reasonable person to

inquire further. *See Phillips Exeter Academy v. Howard Phillips Fund, Inc.*, 196 F.3d 284, 288 (1st Cir.1999) (this court "may affirm the judgment for any independent reason made manifest in the record"). Had the Wheelers inquired further, the requisite facts were present in the Boston and Oklahoma television and press coverage to allow a reasonable person to infer a causal connection between the FBI's actions and Roger Wheeler's murder.

Patricia Wheeler (Roger's widow) saw the "60 Minutes" program in May 1998 and some of the Oklahoma press articles; they were sufficient at least to trigger a duty to inquire before the May 11, 1999 critical date, painful as the subject was to her. The same is essentially true of Lawrence Wheeler, one of Roger's sons.

Pamela Wheeler Norberg (Roger's only daughter) did not see the "60 Minutes" segment. She has stated by affidavit that she did not read any of the press coverage in the record on the painful subject of her father's murder, and that she is estranged from her brothers and communicates with them only infrequently. While her claim presents a closer case, we find that she had a duty to inquire based on local and national press coverage. "[W]here events receive ... widespread publicity, plaintiffs may be charged with knowledge of their occurrence." *United Klans of Am. v. McGovern*, 621 F.2d 152, 154 (5th Cir.1980) (national news coverage over networks, wire, and newspapers reported that defendant held press conference admitting facts supporting the claim); *see also Hughes v. Vanderbilt Univ.*, 215 F.3d 543, 548 (6th Cir.2000) (front-page stories in two local newspapers and a major television network gave rise to constructive knowledge, even though plaintiff said she did not see the coverage). Although we recognize that the question of whether a reasonable person in Pamela's position

would have read news coverage is a fact-intensive inquiry and can sometimes be difficult to resolve on a motion to dismiss,[7] we find that, on the facts of this case, the record is sufficient to establish notice. Local news coverage in Tulsa, where Pamela lived, was extensive and mentioned Roger Wheeler specifically by name, often in the lead paragraph of the story. Furthermore, nothing in the record shows that Pamela was estranged from her mother, who did watch the "60 Minutes" show and read at least some press coverage. A reasonable person in Pamela's situation would have been provoked to inquire further; had she done so, she would have filed a claim earlier.

Mark Wheeler, the youngest son, lives in Texas and did not see the "60 Minutes" show, although he was aware that his brother would be appearing on it. He stated by affidavit that he read only one or two of the articles in the Tulsa press and that he communicates only infrequently with his family because of tensions arising from his father's murder. He presents an even closer case than Pamela because he lived in Texas and the television and press coverage in the record appeared mostly in either Boston or Tulsa sources. But we find that he too had a duty to inquire, which if pursued, would have led him to file his claim earlier. He was aware of the "60 Minutes" show and, by implication, of national news coverage of his father's murder. He had access to Tulsa news, as demonstrated by his reading of at least one or two articles in the Tulsa newspapers on the subject of his father's death, so if he had inquired further, he could

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[7] *See Bibeau v. Pac. Northwest Res. Found., Inc.*, 188 F.3d 1105, 1110 (9th Cir.1999) (additional factfinding necessary to determine if press coverage would have reasonably put a similarly situated plaintiff on notice); *Orlikow v. United States*, 682 F.Supp. 77, 85 (D.D.C.1988) (more factfinding necessary for accrual of FTCA claim because "[n]ewspaper articles containing allegations do not necessarily place citizens on notice when there is no evidence that these articles were read").

have learned the necessary facts through that medium.

[5] The claim of equitable tolling of the two-year limit fails, to the extent that such a claim is cognizable against the government at all.[8] It is true that the FBI had a long history of denying that Bulger and Flemmi were informants, that there was any "special" relationship between the FBI and the two, and then that any impropriety resulted from the relationship. For purposes of equitable tolling, however, the government's denials were superseded when Morris testified in April 1998 in the *Salemme* hearings that he and Connolly shielded Bulger and Flemmi from prosecution and that they may have been responsible for Halloran's death.

III.

The dismissal of the claim against the United States in the McIntyre case is ***reversed*** and the case is remanded for further proceedings consistent with this opinion. The dismissal in the Wheeler case is ***affirmed***.

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[8] *Compare Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) (stating that equitable tolling applies in Title VII suits against the government on the same terms as it would against a private employer), with *United States v. Beggerly*, 524 U.S. 38, 49-50, 118 S.Ct. 1862, 141 L.Ed.2d 32 (1998) (holding that equitable tolling does not apply to actions under the Quiet Title Act, 28 U.S.C. § 2409a, for reasons that could also apply to the FTCA).

APPENDIX G

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THE ESTATE OF ARTHUR M. BARRETT by ELAINE BARRETT, in her capacity as Administratrix of The Estate of Arthur M. Barrett, Plaintiff	
v.	
UNITED STATES OF AMERICA H. PAUL RICO JOHN MORRIS JOHN J. CONNOLLY, JR. RODERICK KENNEDY ROBERT FITZPATRICK JAMES RING JAMES AHEARN JAMES GREENLEAF KEVIN WEEKS JAMES BULGER STEPHEN FLEMMI JOHN DOES, Nos. 1-50, Defendants	CIVIL ACTION NO. 03-10601-MLW

PLAINTIFF'S COMBINED OPPOSITION AND SUPPORTING MEMORANDUM IN RESPONSE TO MOTION OF DEFENDANT, UNITED STATES, TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

Plaintiff hereby opposes the Motion of Defendant, United States, joined in by Defendant, John Morris, to Dismiss for Lack of Subject Matter Jurisdiction and combines with this Opposition the following Memorandum in Support thereof.

PLAINTIFF'S MEMORANDUM IN SUPPORT OF OPPOSITION

The Motion to Dismiss Ignores the Interplay Between the Obligations Imposed on Plaintiff and Her Counsel for Purposes of Filing an Administrative Claim and Those Imposed on Plaintiff and Her Counsel Under Fed. R. Civ. P. 11.

Fed. R. Civ. P. 11(a) requires that every pleading, written motion and other paper shall be signed by at least one attorney of record in the attorney's individual name, or if the party is not represented by an attorney, shall be signed by the party. Rule 11(b) (3) provides that by presenting to the court (whether by signing, filing, submitting, or later advocating) a pleading, written motion, or other paper) an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. Very serious sanctions may be imposed under Rule 11(c) for violations of Rule 11(b).

The United States' Motion to Dismiss and Supporting Memorandum make no reference to the role of Rule 11 in the scheme of things. Nor do they refer to the fact that Plaintiff's administrative claim (Exhibit A) was denied by the Department of Justice on April 15, 2003 (Exhibit B), ninety-one days after it was received and thirteen days after this action was commenced, electing to treat the administrative claim as having been denied. (Compl. ¶¶ 26-27)

The interplay between Rule 11 and the filing and belated denial of the administrative claim is best appreciated in the context of the core premise of the United States' Motion to Dismiss:

> "Plaintiff, the Estate of Arthur M. Barrett, did not present a claim to the Federal Bureau of Investigation ("FBI") until January 14, 2003. That date is nearly three years after Mr. Barrett's remains were exhumed in a well publicized dig for victims of two longtime FBI informants, James "Whitey" Bulger and Stephen Flemmi, amidst a storm of controversy and publicity about their use as informants. It is nearly five years after the Boston media market began to be inundated with hundreds of newspaper articles raising questions about the relationship between the FBI and these informants, including ninety-nine articles that specifically reported on their murder of Mr. Barrett. On the basis of these articles, Elaine Barrett, the decedent's widow, and administratrix for the Estate, who resides in Quincy, Massachusetts, should have been aware of both the Estate's injury—Mr. Barrett's murder by Bulger and Flemmi—and the alleged government nexus to this injury long before January 14, 2001."

So because of what they read or should have read in the newspapers, Plaintiff and her counsel are charged by the United States with awareness, long before January 14, 2001, that Arthur H. Barrett had been murdered by Bulger and Flemmi and that the government was responsible for that murder. However, it is, at best, doubtful that "I read it in the newspapers" is the certification contemplated by Rule 11(b) (3) . Moreover, under Rule 11 (b) (3) what inquiry is reasonable under the circumstances to justify the belief that Plaintiff and her counsel have evidentiary support, or are likely to have it after a reasonable opportunity for further investigation or discovery? Indeed, the knowledge requirement underlying the accrual of an FTCA claim has been held to have a reasonable diligence component. *Skwira v. United* States, 344 F.3d 64 (1st Cir. Sept. 15, 2003) "A plaintiff may not bury her head in the sand. If she fails to undertake a reasonably diligent investigation into the cause of the injury, the law will impute to her an awareness of any knowledge that she would have uncovered." *See id* at 78; U.S. Supporting Memorandum, pp. 12-13. This brings us to the issue that lies at the heart of this matter: Can the Department of Justice and the FBI, acting on Executive Order of the President, or otherwise, stonewall the Courts, Congress and Claimants by withholding and concealing relevant, even crucial, evidence and be rewarded with a dismissal of the FTCA claim for having done so. The answer should be that it cannot profit from its own obstruction of justice. What investigation and reasonable inquiry could Plaintiff and her counsel have conducted? The answer is none. The United States stonewalled Judge Wolf in *United* States *v. Salemme, et al.*, 91 F.Supp.2d 141 and key information was not made available to Judge Lindsay in his consideration and allowance of the Motions of the United States to Dismiss for Lack of Subject Matter Jurisdiction in the McIntyre case (Civil

Action No. 01-10408-RCL) and the Wheeler case (Civil Action No. 02-10464) on March 31, 2003. It would have been a fool's errand for Plaintiff and her counsel to seek witness statements or cooperation from the Department of Justice, the FBI or any of the individual defendants. Moreover, Bulger, was and is a fugitive from justice, a status which was purportedly caused by the FBI. No statute of limitations should run while that status persists. Moreover, Bulger's being at large posed a threat to Plaintiff and her family that could not be ignored.

Congress' House Committee on Government Reform

All of this was made clear by Congress' House Committee on Government Reform in its Report on November 20, 2003. The investigation culminating in that report commenced in the 107th Congress (2001-2002) and continued in the 108th Congress (2003-2004). Plaintiff's counsel became aware of hearings in May, 2001 and for the first time believed that necessary evidence and facts would be obtained by the Committee and made available to the public. But the stonewalling had not ceased. The entirety of the Report, which was issued less than two months ago, instructs us as to key evidence not previously available. Plaintiff and her counsel urge that special consideration be given to Section I, Executive Summary, of the Report, last paragraph on page 8 and top of page 9 and last three paragraphs of Section I on page 12:

> "When the FBI Office of Professional Responsibility conducted an investigation of the activities of New England law enforcement, it concluded in 1997: 'There is no evidence that prosecutorial discretion was exercised on behalf of [James] Bulger and/or [Stephen] Flemmi.'

This is untrue. Former U.S. Attorney Jeremiah O'Sullivan was asked at the December 5, 2002 Committee whether prosecutorial discretion had been exercised on behalf of Bulger and Flemmi, and he said that it had. A review of documents in the possession of the Justice Department also confirms this to be true. Had the Committee permitted an assertion of executive privilege by the President to go unchallenged, this information never would have been known. That the Justice Department concluded that prosecutorial discretion had not benefited Bulger or Flemmi—while at the same time fighting to keep Congress from obtaining information proving this statement to be untrue—is extremely troubling."

"In excess of two billion dollars in civil lawsuits were filed as the direct result of federal law enforcement decisions to use Jimmy Flemmi, Stephen Flemmi, and James Bulger as criminal informants. From the outset, the Department of Justice has used litigation tactics to defeat these lawsuits that, at best, can be characterized as contrary to respect for the rule of law."

"The use of murderers as government informants created problems that were, and continue to be, extremely harmful to the administration of justice." (Emphasis added)

"Incalculable damage to the public's respect for the rube of law has been done by the actions of federal law enforcement personnel in Boston from 1965 until the present. (Emphasis added)

Factors in Addition to Report of House Committee on Government Reform

The plaintiff and her counsel respectfully submit that in view of the plea agreement of Stephen Flemmi and the indictment of H. Paul Rico, in addition to the Report of the House Committee on Government Reform, all of which are recent events, this Court should Rule that the time has not yet expired on the filing of ~~the Plaintiff~~'s administrative claim and that it had certainly not expired when it was received on January 14, 2003.

WHEREFORE, the Plaintiff respectfully requests that the Motion, of the Defendant United States to Dismiss for Lack of Subject Matter Jurisdiction, joined in by Defendant John Morris be denied.

Plaintiff's Request for Oral argument

Plaintiff believes that oral argument may assist the Court and she respectfully requests a hearing.

Respectfully submitted,
The Estate of Arthur Barrett
By Their Attorney

/s/ Earle C. Cooley
Earle C. Cooley
Cooley Manion Jones LLP
21 Custom House Street
Boston, MA 02110, 617-737-3100

and

/s/ Kevin M. Glynn
Kevin M. Glynn
Cooley Manion Jones LLP
11 Baystate Road, Unit #2
Boston, MA 02115 (617) 267-4704

January 12, 2004

CERTIFICATE OF SERVICE

I, Earle C. Cooley, Attorney for the Plaintiff, hereby certify that a true copy of the above document was served as follows on each party appearing pro se and the attorney of record for each other party by U.S. mail on January 12, 2004.

Stacey Bosshardt
Trial Attorney, Torts Branch
Civil Division, U.S. Department of Justice
P.O. Box 888, Benjamin Franklin Station
Washington, D.C. 20044
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/s/ Earle C. Cooley
Earle C.Cooley

U.S. Department of Justice

Civil Division, Torts Branch
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JA:PJP:PSchlossman
157-16-25994

VIA CERTIFIED MAIL
RETURN RECEIPT REQUESTED

April 15, 2003

Mr. Earle C. Cooley
Cooley, Manion, Jones, LLP
21 Custom House St.
Boston, MA 02110-3536

Re: Admistrative tort claims of the Estate of Arthur M. Barrett

Dear Mr. Cooley:

On April 2, 2003, you filed a lawsuit in United States District Court following presentation of the administrative tort claim of the Estate of Arthur M. Barrett. This letter denies your administrative claim.

Section 2401(b) of Title 28 states that "[a] tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate

Federal agency within two years after such claim accrues . . . ." Because it appears on the face of our administrative claim that your claim accrued more than two years before you presented it, your claim is barred, and is therefore, denied. This denial should not be construed as an exhaustive statement of the defenses available to the United States.

I am required by law (28 C.F.R. § 14.9(a)) to inform you that if you are dissatisfied with this determination, you may file suit in an appropriate United States District court not later than six months after the date of mailing of this notification of denial. 28 U.S.C. § 2401(b).

Very truly yours,

/s/ Jeffrey Axelrad
JEFFREY AXELRAD
Director, Torts Branch
Civil Division

cc: Honorable Kenneth L. Wainstein
General Counsel, Federal Bureau of Investigation
935 Pennsylvania Avenue, N.W.
Washington, D.C. 20535-0001

EXHIBIT A

APPENDIX H

337 F.Supp.2d 370

United States District Court,
D. Massachusetts.
The ESTATE of Arthur M. BARRETT by Elaine BARRETT, in her capacity as Administratrix of the Estate of Arthur M. Barrett, Plaintiff,
v.
THE UNITED STATES of America, et al., Defendants.
No. CIV.A.03-10601-RCL.
Sept. 29, 2004.

Background: Estate of murder victim brought action pursuant to Federal Tort Claims Act (FTCA) and *Bivens*, against government and Federal Bureau of Investigation (FBI) agents, alleging that victim was murdered by government informants. Defendants moved to dismiss.

Holding: The District Court, Lindsay, J., held that causes of action against United States under Federal Tort Claims Act (FTCA), and *Bivens* and wrongful death claims in cause of action against FBI agents, for alleged failure to prevent the murder, accrued, at the latest, on the date that victim's wife told a journalist that the government was responsible for the murder because it had given the informants a "license to kill".

Motions granted.

Stacey Bosshardt, U.S. Department of Justice, Torts Branch, Civil Division, Washington, DC, for United States of America, Defendant.

William A. Brown, Boston, MA, for Robert Fitzpatrick, Defendant.

Earle C. Cooley, Cooley Manion Jones LLP, Boston, MA, Kevin M. Glynn, Cooley Manion Jones LLP, Boston, MA, for Elaine Barrett, Plaintiff.

Brian P Fitzsimmons, Hanley, Hassett & Fitzsimmons, LLC, Milton, MA, for James Ahern, Defendant.

Douglas I. Louison, Stephen C. Pfaff, Merrick, Louison & Costello, Boston, MA, for Roderick Kennedy, Defendant.

Peter E. Mullane, Mullane, Michel & McInnes, Cambridge, for John J. Connolly, Jr., Defendant.

E. Peter Parker, Boston, for H. Paul Rico, Defendant.

Christine M. Roach, Roach & Carpenter, P.C., Boston, for James Greenleaf, Defendant.

Alan D. Rose, Jr., Rose & Associates, Boston, for James Ring, Defendant.

MEMORANDUM AND ORDER ON MOTIONS OF THE UNITED STATES, FITZPATRICK, AND MORRIS TO DISMISS BASED ON THE STATUTE OF LIMITATIONS

LINDSAY, District Judge.

I. INTRODUCTION

This is an action brought by Elaine Barrett (the "plaintiff") as the administratrix of the Estate of Arthur M. Barrett (the "Estate") against the United States of America, Robert Fitzpatrick and John Morris, (the "agents," both of whom were FBI agents at the times relevant to the complaint), and others. The case arises out of the circumstances surrounding the murder of Arthur M. Barrett ("Barrett"), who was killed sometime after he disappeared on or about July 26, 1983. The plaintiff has alleged that crime lords James J. Bulger and Stephen J. Flemmi and their associates murdered Barrett. The plaintiff also alleges that, at the time of Barrett's murder, Bulger and Flemmi were "top echelon" informants for the Federal Bureau of Investigation (the "FBI") and leaders of the Boston

area's Winter Hill Gang, an association of individuals engaged in criminal activities. The complaint alleges that the United States, Fitzpatrick, Morris, and others allegedly permitted Flemmi and Bulger to commit criminal activities with impunity, including the murder of Barrett.

The complaint is in twelve counts.[1] In counts I through IV, the plaintiff asserts wrongful death claims by the Estate against the United States, Fitzpatrick, and Morris. Count VI contains an additional claim against the United States for wrongful death. The claims against the United States purport to have been brought pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2401, 2671, *et seq.* The United States has moved to dismiss all of the claims against it for lack of subject matter jurisdiction, claiming that the plaintiff failed to present her administrative claim to the appropriate federal agency within two years of the accrual of that claim, as required by the FTCA, 28 U.S.C. § 2401(b). The plaintiff presented her administrative complaint on behalf of the Estate on January 14, 2003.

In counts IX, X, XII, and XIII, the plaintiff also maintains that the conduct of Fitzpatrick and Morris is actionable under the rule stated in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), because the conduct violated Barrett's rights under the Fourth and Fifth amendments to the Constitution of the United States and the Estate's right to access to courts guaranteed by the First and Fifth amendments. The plaintiff's *Bivens* and wrongful death claims against Fitzpatrick and Morris are

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[1] The complaint does not contain a claim captioned as "Count V" but does contain two counts captioned as "Count XIII." Because the second "Count XIII" is a request for attorneys' fees, I consider it a request for relief rather than a cause of action.

subject to three-year statutes of limitations.[2] The plaintiff filed her lawsuit on April 2, 2003. Fitzpatrick and Morris moved to dismiss the claims against them as time-barred (docket entries 24 and 12).[3] In their respective motions, Fitzpatrick and Morris adopt the argument of the United States has made in support of its motion to dismiss.

For the reasons stated below, I hold that the plaintiff presented her administrative claim more than two years after its accrual, and therefore I GRANT the motion to dismiss of the United States. I also hold that the plaintiff filed this lawsuit more than three years after her state law and *Bivens* claims against Fitzpatrick and Morris accrued, and therefore I GRANT their motions to dismiss.

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[2] Because Congress has not established a time limitation for *Bivens* actions, the three-year Massachusetts statute of limitations applicable in tort actions for personal injuries, Mass. Gen. Laws ch. 260, § 2A, or civil rights actions, Mass. Gen. Laws ch. 260, § 5B, and any associated state tolling laws will apply, provided they are not inconsistent with federal law or policy. *Wilson v. Garcia*, 471 U.S. 261, 266-67, 276-80, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985). Because both statutes have a three-year period of limitations, it is unnecessary to decide whether Mass. Gen. Laws ch. 260, § 5B supplants Mass. Gen. Laws ch. 260, § 2A for purposes of federal civil rights actions. *Street v. Vose*, 936 F.2d 38, 39 n. 2 (1st Cir.1991).

Under Massachusetts law, an action for wrongful death "shall be commenced within three years from the date of death, or within three years from the date when the deceased's executor or administrator knew, or in the exercise of reasonable diligence, should have known of the factual basis for a cause of action." M.G.L. ch. 229 § 2.

[3] Morris and Fitzpatrick captioned their motions as motions to dismiss for lack of subject matter jurisdiction. Because subject matter jurisdiction is not at issue with respect to the plaintiff's common law or *Bivens* claims against Morris and Fitzpatrick, I will treat their motions as having been brought pursuant to F.R.C.P. 12(b)(6).

II. FACTUAL BACKGROUND

In considering the United States' motion to dismiss for lack of subject matter jurisdiction, I "accept[ ] the plaintiff's version of jurisdictionally-significant facts as true" and "assess whether the plaintiff has propounded an adequate basis for subject matter jurisdiction." *Valentín v. Hospital Bella Vista*, 254 F.3d 358, 363 (1st Cir.2001).[4] In considering the motions to dismiss of Fitzpatrick and Morris, I must "accept the plaintiff's well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff." *United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 224 (1st Cir.2004). I nonetheless "reject claims that are made in the complaint if they are 'bald assertions' or 'unsupportable conclusions.' " *Id.* In analyzing the motions, I may consider certain extrinsic materials without engaging in jurisdictional factfinding or converting the motion to dismiss into one for summary judgment. *See Valentín*, 254 F.3d at 363; *Dynamic Image Techs., Inc. v. United States*, 221 F.3d 34, 37 (1st Cir.2000); *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir.1993) (explaining that " documents the authenticity of which are not disputed by the parties," " official public records," "documents central to [the] plaintiffs' claim," or "documents sufficiently

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[4] The First Circuit's shorthand for the method of considering a motion to dismiss for lack of subject matter jurisdiction without challenging the truthfulness *vel non* of plaintiff's allegations is the "sufficiency challenge." *Valentín*, 254 F.3d at 363. I could also determine whether the plaintiff's allegations supporting subject matter jurisdiction can withstand a "factual challenge." *Id.* Under this approach, "the plaintiff's jurisdictional averments are entitled to no presumptive weight," and "the court must address the merits of the jurisdictional claim by resolving the factual disputes between the parties." *Id.* In this case, however, I do not need to engage in differential factfinding because the government has treated the plaintiff's factual allegations as true.

referred to in the complaint" may be considered in ruling on a motion under Fed.R.Civ.P. 12(b)(6)).

For purposes of this memorandum, I will assume the reader's familiarity with the numerous allegations contained in the plaintiff's lengthy complaint. Most of the plaintiff's allegations were drawn from the findings of fact in *United States v. Salemme*, 91 F.Supp.2d 141 (D.Mass.1999) (Wolf, J.), *rev'd in part on other grounds by United States v. Flemmi*, 225 F.3d 78 (1st Cir.2000). *See* Compl. ¶ 6 ("This complaint closely tracks the findings and rulings of the United States District Court for the District of Massachusetts [contained in *Salemme*]."). The complaint also appears to have been created by a manual cutting and pasting of the complaint in *McIntyre v. United States, et al*, Civil Action No. 01-10408-RCL. In determining whether the plaintiff's FTCA claims accrued more than two years before she presented her administrative claim, I have considered the numerous media reports the government submitted in conjunction with this motion, focusing in particular on an article published on March 9, 2000, in which the plaintiff was quoted as having said, in reference to Barrett's death that, "the government is responsible." U.S. Mem. Supp. Mot. Dismiss Ex. 1 (Shelley Murphy, *Burglar Caught in Violent Web Victim Made Last Desperate Calls for Money*, BOSTON GLOBE, Mar. 9, 2000, at B1 (the "Murphy article"), *available at* 2000 WL 3317093).[5] The plaintiff has not contested the authenticity of these documents or the attribution of the preceding statement to her. I have relied on the same documents in analyzing whether the plaintiff's *Bivens* and wrongful death claims against Fitzpatrick and Morris

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[5] Shelly Murphy authored other articles concerning Barrett. *See, e.g.*, U.S. Mem. Supp. Mot. Dismiss Ex. 5. In this memorandum, however, the term "Murphy article" or the shortened citation "Murphy, *supra* " will refer to this March 9, 2000 article.

accrued more than three years before she filed this lawsuit.

According to the plaintiffs, Barrett disappeared on July 26, 1983 and was subsequently tortured and murdered by Bulger, Flemmi, and others. "For more than 16 years after Barrett's disappearance ... his family was ignored by the FBI, except for a brief early visit following his disappearance, when the FBI claimed that Barrett was alive and a fugitive." Compl. ¶ 5. "On September 15, 1999, [the *Salemme* decision] disclosed, for the first time, information bearing on the complicity of the FBI in enabling and covering up the murders of Barrett and others." Compl. ¶ 5. "Four months following the issuance of [*Salemme*], Barrett's bones were uncovered ....." Compl. ¶ 5. On March 9, 2000, the Murphy article reported that Barrett's remains had been identified the previous day. Murphy, *supra*.[6] The article also reported that Kevin Weeks, a former associate of Bulger, cooperating with the police, had led the police to Barrett's remains and had implicated Bulger and Flemmi in the murder of Barrett. *Id.* After explaining that Bulger and Flemmi had been FBI informants, the Murphy article quoted the plaintiff as stating, "I think the government is responsible because if they put [Bulger and Flemmi] away when they should have, [Barrett] would be alive today.... They gave them a license to kill and do whatever they wanted." *Id.* Murphy also reported that the plaintiff "said she feels some closure in knowing what happened to her husband." *Id.* The same article also quoted Kevin Glynn and identified him as an

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[6] The plaintiff has alleged that "post-mortem determinations *and procedures* sufficient to identify *and permit release of Barrett's remains for cremation* were not completed until April, 2000." Compl. ¶ 5 (emphasis added). Because this allegation refers to the timing of both the identification *and release* of Barrett's remains, it does not contradict the statement in the Murphy article that Barrett's remains were identified on March 8, 2000.

attorney representing the Barrett family. *Id.* Glynn later signed the Estate's administrative claim as well as the complaint in this lawsuit.

III. DISCUSSION

A. Motion of the United States

[1] [2] "The general rule, within the meaning of the FTCA, is that a tort claim accrues at the time of the plaintiff's injury." *Skwira v. United States*, 344 F.3d 64, 73 (1st Cir.2003) (quoting *Attallah v. United States*, 955 F.2d 776, 779 (1st Cir.1992)), *cert. denied*, --- U.S. ----, 124 S.Ct. 2836, 159 L.Ed.2d 267 (2004). Under the so-called discovery rule, however, "the test [of accrual] is whether plaintiff knows, or in the exercise of reasonable diligence should have known, the factual basis of the cause of action, including the fact of the injury and the injury's causal connection to the government." *Cascone v. United States*, 370 F.3d 95, 104 (1st Cir.2004). The standard of accrual under the discovery rule is an objective one, *Cascone*, 370 F.3d at 104, and the "reasonable diligence component" of the rule prevents a plaintiff from preserving her claim by "bury[ing] her head in the sand," *Skwira*, 344 F.3d at 77 (quoting *Diaz v. United States*, 165 F.3d 1337, 1339 (11th Cir.1999)). Moreover, the "knowledge" necessary to trigger accrual need not be conclusive or absolute; rather, it consists of "the discovery of sufficient facts about the injury and its cause to prompt a reasonable person to inquire and seek advice preliminary to deciding if there is a basis for filing an administrative claim against the government." *Id.*

Under the FTCA, once a plaintiff's claim against the United States accrues, she has two years to present her administrative claim to the relevant agency of the United States. 28 U.S.C. § 2401(b) A plaintiff presents

an administrative claim by completing a two-page form, and "the burden of preparing this form is minimal." Skwira, 344 F.3d at 70. Contrary to an argument advanced by the plaintiff, the certification requirements of Fed.R.Civ.P. 11(b) apply only to practice in the federal district courts and are irrelevant to the presentment of an administrative claim. *See* Fed.R.Civ.P. 1, 11; *Gualtier v. United States*, 837 F.Supp. 360, 365-66 (D.Kan.1993).

[3] In this case, the plaintiff unquestionably had notice of the factual basis of her claim more than two years before she presented that claim on January 14, 2003. For purposes of this motion, the plaintiff's case is indistinguishable from a related case included in the consolidated appeal *McIntyre v. United States*, 367 F.3d 38 (1st Cir.2004). In *McIntyre*, the theory of liability of the Wheeler plaintiffs was essentially identical to the one advanced by the plaintiff--that the United States was liable for the death of Roger Wheeler because the FBI allowed Bulger and Flemmi to commit crimes with impunity, including the murder of Wheeler. In proceedings leading to the appeal before the First Circuit, I granted a motion by the United States to dismiss the Wheeler complaint for lack of subject matter jurisdiction, based on the statute of limitations. The First Circuit affirmed the dismissal. In so doing, the court explained that the knowledge required to trigger accrual of the FTCA claims of the Wheeler plaintiffs consisted of

> facts available that would permit a reasonable person to conclude (1) that Bulger and Flemmi were instrumental in the murder of Roger Wheeler; (2) that Bulger and Flemmi were informants for the FBI; and (3) that the FBI had a special relationship with Bulger and Flemmi that protected and encouraged them in their criminal activity, including Wheeler's murder.

Id. at 58. Pointing to the substantial news coverage of the relationship between the FBI and Bulger and Flemmi, including information found in reports quoting a representative of Roger Wheeler's estate concerning that relationship, the First Circuit concluded that the Wheeler plaintiffs had or should have discovered all three of the triggering facts more than two years prior to filing of the administrative claim. *Id.* at 58-61.

Like the Wheeler plaintiffs, the plaintiff in this case knew more than two years prior to the filing of her administrative claim that "Bulger and Flemmi were instrumental in the murder of [Barrett]," that "Bulger and Flemmi were informants for the FBI," and that "the FBI ... protected and encouraged [Bulger and Flemmi] in their criminal activity, including [Barrett]'s murder." *Id.* at 58. The plaintiff alleges that the 1999 *Salemme* decision "disclosed, for the first time, information bearing on the complicity of the FBI in enabling and covering up the murders of Barrett and others," Compl. ¶ 5, but she has not alleged any delay in learning of the contents of the opinion. Moreover, on March 9, 2000, the Murphy article quoted the plaintiff as stating that the government was responsible for Barrett's murder, because the FBI had given Bulger and Flemmi a "license to kill." Murphy, *supra*. The plaintiff has not challenged the attribution of that statement to her. Thus, by that statement, the plaintiff has admitted that, not later than March 8, 2000, she had actual knowledge of the involvement of Bulger and Flemmi in Barrett's murder, the fact that Bulger and Flemmi were FBI informants at the time of Barrett's murder, and the fact that the FBI encouraged and protected Bulger and Flemmi in the murder of Barrett.[7] In short, her statement indicates

[7] Because March 8, 2000 is more than two years prior to the date the plaintiff presented her administrative claim and more than three years before the date she filed her lawsuit, I do not

that by March 8, 2000, she knew that the government was responsible for the murder of her husband. The plaintiff's claims accrued no later than that date. Because the plaintiff did not comply with the two-year presentment requirement of the FTCA, I am without jurisdiction over her claims and GRANT the motion of the United States.

B. Motions of Fitzpatrick and Morris

[4] The test of accrual of the *Bivens* and wrongful death claims against Fitzpatrick and Morris is essentially the same as the test of accrual of the plaintiff's claims under the FTCA. *See Marrapese v. Rhode Island*, 749 F.2d 934, 938 n. 8 (1st Cir.1984); M.G.L. ch. 229 § 2. The plaintiff has not argued that there is any difference between the factual basis of her claims under the FTCA and the factual bases of her *Bivens* and wrongful death claims; nor do I find such a distinction. Thus, for the reasons stated above, I find that the plaintiff's *Bivens* and wrongful death claims accrued not later than March 8, 2000--more than three years prior to the April 2, 2003 filing of this lawsuit.

[5] [6] The plaintiff argues that the certification requirements of Rule 11(b) either delayed accrual of her claim or served as an obstacle to the filing of her lawsuit within the three-year period of limitations following the accrual of her claim. This proposition is wholly without merit. Indeed, it strains the straight-face test.[8] When an attorney signs a complaint (or

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need to decide the earliest date at which her claims could have accrued. Nonetheless, by referring to March 8, 2000 as a date by which the plaintiff knew of the factual basis her claim, I do not exclude the possibility that she acquired or should have acquired that knowledge well before March 2000.

[8] A more appropriate concern for the requirements of Rule 11 would have counseled caution in the filing of a complaint that

other pleading) in a federal district court, he or she certifies that "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, ... (3) the allegations and other factual contentions have evidentiary support or ... are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." *Id.* Fed.R.Civ.P. 11(b). While the reasonable inquiry requirement is not to be taken lightly, Rule 11 does "allow pleadings based on evidence reasonably anticipated after further discovery or investigation." *Rotella v. Wood*, 528 U.S. 549, 560, 120 S.Ct. 1075, 145 L.Ed.2d 1047 (2000) (holding that plaintiff's RICO claim was barred by the statute of limitations). Whether an inquiry is "reasonable under the circumstances" takes into account the lack of access to information within the defendant's exclusive control. *See* *Robinson v. Dean Witter Reynolds, Inc.*, 129 F.R.D. 15, 22 (D.Mass.1989) ("If the lawyer has only limited ... access to information prior to filing, it is reasonable for her to conduct a less extensive inquiry ...." (quoting Note, *Plausible Pleadings: Developing Standards for Rule 11 Sanctions*, 100 Harv. L.Rev. 630, 642-43 (1987))). Moreover, an attorney's reliance on public reports of circumstances alleged in a complaint may be a reasonable inquiry for purposes

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was so clearly time-barred as the one here. *See* *Brubaker v. City of Richmond*, 943 F.2d 1363, 1385 (4th Cir.1991) ("Where an attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent ... he makes a claim groundless in law and is subject to Rule 11 sanctions."); *McHenry v. Utah Valley Hosp.*, 724 F.Supp. 835, 838 (D.Utah 1989) (concluding that "a reasonable inquiry into the law would have shown that [the plaintiff]'s claim was time-barred and the statute of limitations is constitutionally sound," and awarding Rule 11 sanctions); *Murphy v. Klein Tools, Inc.*, 123 F.R.D. 643, 646-47 (D.Kan.1988) (citing circuit and district court cases where courts found "sanctionable conduct under Rule 11 for bringing claims clearly time-barred under the respective statutes of limitations.").

of Rule 11(b). *Cook v. Rockwell Int'l Corp.*, 147 F.R.D. 237, 246 (D.Colo.1993).[9]

Here, there was an abundance of information available prior to March 8, 2003 that the plaintiff's attorneys could have used to conduct an inquiry comporting with the requirements of Rule 11(b). Most notably, the detailed findings in *Salemme*-- based on sworn testimony taken in hearings that spanned a year and produced 17,000 pages of transcripts, 141 F.2d at 163---- provided an ample factual basis for performing such an inquiry years before the plaintiff filed her complaint. Moreover, the fact that the attorneys for the plaintiff relied on *Salemme* in drafting the complaint filed on April 2, 2003 is proof positive that the opportunity for a reasonable inquiry was available within the period of limitations.

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[9] *See also* *Forbes v. Eagleson*, 19 F.Supp.2d 352, 375-76 (E.D.Pa.1998) (holding that the plaintiffs' RICO claims were time-barred, and explaining that reliance on a report written by a lawyer and based on extensive investigations would have satisfied Rule 11(b); also explaining that "[p]laintiffs would have acted consistent with Rule 11" if, after having read news articles describing "self-enriching" schemes between RICO defendants, the plaintiff had "simply contacted sources cited by [the media reports]"); *Greenfield v. U.S. Healthcare, Inc.*, 146 F.R.D. 118, 125 (E.D.Pa.1993) (attorney who had relied on articles in respected newspaper and industry publications, publicly available documents, and securities law in filing class action securities litigation complied with Rule 11(b)); *In re Air Disaster at Lockerbie, Scotland*, 144 F.R.D. 618, 621 (E.D.N.Y.1992) ("[P]arties and their attorneys may base their complaints and requests for discovery on ... hearsay reports and statements of others until such time, if ever, as they are satisfied that the statements ... are not competent or are otherwise untrustworthy."); *Kamerman v. Steinberg*, 113 F.R.D. 511, 514-15 (S.D.N.Y.1986) (news articles and public documents provide a reasonable factual basis for claims based on securities violations).

IV. CONCLUSION

For the reasons stated above, the motions of the United States, Fitzpatrick, and Morris to dismiss are GRANTED.

SO ORDERED.